161 U.S. 588

EXTRACTS FROM TRANSCRIPT OF RECORD.

161-588

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 706.

HENRY C. ROUSE, RECEIVER DE BONIS NON OF THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN E. HORNSBY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RECORD FILED AUGUST 19, 1895.

(15,996.)

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INDEX.

	Page.
Caption	1
Proceedings in circuit court of the United States for the district of Kansas	1
Citation	1
Writ of error	2
Return to writ	3
Petition of intervention of John E. Hornsby	3
Cost bond	9
Appearance for M., K. & T. R'y Co	9
Amended answer to petition of intervention	10
Reply to amended answer	15
Motion for order of reference to master	19
Order overruling motion for order of reference	20
Motion of intervenor for jury	20
Order granting motion of intervenor for jury	21
Order beginning trial	22
Order continuing trial	22
Order concluding trial	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1895.

	Page.
Verdict	23
Judgment	24
Motion for new trial	25
Order overruling motion for new trial	26
Defendant's requests for instructions and rulings thereon	26
Instructions given by the court	30
Assignment of errors	33
Petition for writ of error	35
Petition for appeal	36
Order allowing appeal	36
Bond on writ of error	36
Clerk's certificate	37
Appearance for plaintiffs in error	38
Appearance for defendant in error	38
Suggestion of death of receivers and notice	39
Order for continuance	40
Motion and consent to substitute Henry C. Rouse, receiver, as plaintiff in error	41
Order of substitution, &c	42
Motion to strike out certain assignments of error	43
Stipulation as to foregoing motion	44
Motion to certify question to United States Supreme Court	45
Order denying motion to strike out and motion to certify question	47
Hearing and submission	47
Opinion	48
Judgment	51
Petition for writ of error	51
Assignment of errors	52
Bond on writ of error	55
Writ of error	56
Return on writ of error	57
Citation	57
Clerk's certificate	58

(Record, page 1.)

Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1894, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the third day of December, A. D. 1894, before the Hon. Henry C. Caldwell, Hon. Walter H. Sanborn, and Hon. Amos M. Thayer, circuit judges.

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Seal of the U. S. Circuit Court of Appeals, Eighth Circuit.]

Be it remembered that heretofore, to wit, on the eleventh day of June, A. D. 1894, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas and Texas Railway Company, plaintiffs in error, *vs.* John E. Hornsby, intervenor, defendant in error; which said transcript of record is in the words and figures following, to wit:

(Record, page 2.)

United States of America to John E. Hornsby (intervener), Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the first division of the judicial district of Kansas, wherein Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas R'y Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John A. Riner, judge, assigned to hold the circuit court of the United States for the district of Kansas, this 16th day of April, in the year of our Lord one thousand eight hundred and ninety-four.

JOHN A. RINER.
United States District Judge, Assigned to hold the Circuit Court for the District of Kansas.

Service of above and foregoing citation hereby accepted this 18th day of April, 1894.

CASE & GLASSE AND
W. D. ATKINSON,
Att'ys for John E. Hornsby, said Intervener.

No. 6181. United States circuit court, first division of the judicial district of Kansas. John E. Hornsby, intervener, *vs.* Geo. A. Eddy and H. C. Cross, receivers, etc. Citation. Filed April 16, 1894. Geo. F. Sharitt, clerk.

(Record, page 2.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit — of the United States for the first division of the judicial district of Kansas, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1893, thereof, between John E. Hornsby, intervener, against Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas R'y Company, a manifest error hath happened, to the great damage of the said Geo. A. Eddy and Harrison C. Cross, receivers as aforesaid, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 15th day of June, 1894, to the end that, the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and ninety-four. Issued at office, in the city of Topeka, with the seal of the circuit court of the United States for the first division of the judicial district of Kansas, dated as aforesaid.

Seal of the Circuit Court of the United States, District of Kansas.

GEO. F. SHARITT,
Clerk Circuit Court United States,
Fifth Division of the Judicial District of Kansas.

Allowed by—
JOHN A. RINER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
First Division of the Judicial District of Kansas, } ss:

In obedience to the command of the within writ I herewith transmit to the United States circuit court of appeals for the eighth circuit a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of Topeka, this 14th day of May, A. D. 1894.

Seal of the Circuit Court of the United States, District of Kansas.

GEO. F. SHARITT,
Clerk of said Court.

No. 6181. United States circuit court, first division of the judicial district of Kansas. John E. Hornsby, intervener. Geo. A. Eddy and H. C. Cross, receivers, etc. Writ of error to the circuit court of the United — for the first division of the judicial district of Kansas. Filed 16th day of April, 1894. Geo. F. Sharitt, clerk.

(Record, page 4.)

Petition of Intervention of Claimant, John E. Hornsby.

THE MERCANTILE TRUST COMPANY, Complainant,
against
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company, Defendants; John E. Hornsby, Intervener. } No. 6181.

Now comes John E. Hornsby and, availing himself of the rights, privileges, and provisions of the order of this court made in the suit above entitled on June 8th, 1891, and seeking the protection thereof, for his cause of action against George A. Eddy and Harrison C. Cross, as receivers of the railway and property of the Missouri, Kansas and Texas Railway Company, represents to said court and avers—

That the Missouri, Kansas and Texas Railway Company was at all times hereinafter mentioned, is now, and for a long time past has been a duly and legally incorporated railway incorporation, incorporated under and by virtue of the laws of the State of Kansas, and was at all times hereinafter mentioned and now is the owner of various lines of railroad, right of way, road-beds, engines, cars, rolling stock, sidings, switches, switch yards, repair and machine shops, and other railway property, and, among others, a railroad or line of railway extending from the city of Parsons, Labette county, Kansas, northward to Junction City, a distance of $168\frac{8}{10}$ miles, through the counties of Labette, Neosho, Allen, Woodson,

Coffey, Lyon, Morris, and Davis, in the State of Kansas, known as and called the Neosho division of the Missouri, Kansas and Texas railway, and also lines of railway extending from the said city of Parsons northward to Hannibal, Missouri, and southward to Denison, Texas, and elsewhere.

That said George A. Eddy and Harrison C. Cross were, on the 25th day of September, A. D. 1888, by Hon. David J. Brewer, then United States circuit judge, presiding over the United States circuit court for the district of Kansas, duly and legally appointed receivers of all the railroads and property of the Missouri, Kansas and Texas Railway Company, and did soon thereafter duly qualify as such and assume the duties of receivers of said railway and property.

That from the time of assuming the duties of receivers, on the first day of November, A. D. 1888, so as aforesaid, to the first day of July, A. D. 1891, the said Geo. A. Eddy and Harrison C. Cross were duly and legally in the possession of and were continuously operating, controlling, running, and managing all the lines of railroad of the Missouri, Kansas and Texas Railway Company, together with all its engines, cars, rolling stock, machine and repair shops, and all other property belonging to said railway company.

That said receivers, their agents and employés, in operating said Neosho division of said railway, ran daily one passenger train and one local freight train over and along said railway from said city of Parsons northward to said city of Junction City, and one passenger train and one local freight train from said city of Junction City southward to said city of Parsons.

That said passenger trains, when running northward over and along said railway between said *said* two cities, were known as and called by said receivers, their agents and employés, "passenger train No. 10," and when running southward over and along said railway between the two cities, "passenger train No. 9;" that said local freight trains, when running northward over and along said railway between said two cities, were known as and called by said receivers, their agents and employés, "local freight train No. 58," and when running southward over and along said railway between said two cities, "local freight train No. 57."

That continuously from the seventeenth day of May, A. D. 1891, to the first day of July, A. D. 1891, said receivers, their agents and employés, operated said passenger trains and said freight trains over and along said railway in accordance with and pursuant to the time, the rules and directions prescribed and required "by time-table No. 5," prepared and issued by said receivers, their agents and employés, by them used and ordered to be used in the operation of moving and running all trains over and along said railway.

That by the rules and requirements of said time-table all passenger trains in both directions had absolute and indefinite right over all freight trains in both directions, and freight trains were required to keep entirely out of the way of passenger trains and be on the siding at least five minutes before passenger trains were due; also freight trains should not exceed a speed of seventeen miles per hour.

That by the rules and requirements of said time-table said freight train No. 58 should each day be upon the siding of the station at Hartford, in Lyon county, Kansas, on said railway, at 12.40 p. m., and out of the way of and meet passenger train No. 9, due there at 12.45 p. m. of each day.

That on the third day of June, A. D. 1891, said passenger train No. 9, composed of one combined baggage and express car, one combined mail and smoking car, and one passenger coach, attached to engine No. 6, left the city of Junction City, moving southward over and along said railway, and arrived at said station of Hartford on time, at 12.45 p. m. of said day, then in charge and under the control of E. L. Green as conductor thereof, who was at said time an employé of said receivers.

That said engine No. 6 was being managed, operated, and controlled by Charles H. Howlett as engineer thereof, who was at said time an employé of said receivers.

That on said day said freight train No. 58, composed of a caboose and numerous freight cars, attached to engine No. 147, was moving northward from said city of Parsons over and along said railway, in charge and under the control of William Berry as conductor thereof, who was at said time an employé of said receivers; that said engine No. 147 was being managed, operated, and controlled by Engineer Alfred Wick, who was at said time an employé of said receivers.

That on said day said passenger train No. 9 left said station of Hartford on time at 12.46 p. m., moving over and along said railway southward toward and for the station at Rockeby, 6.9 miles distant, and when about three-fourths of one mile southward out and from said station at Hartford and at a place where and a time when said passenger train had the absolute and indefinite right of way and track, unobstructed by any freight trains, cars, or engines, suddenly and without signal or warning, freight engine No. 147, then being managed, operated, and controlled by said Engineer Alfred Wick, dashed round a sharp curve in said railway at a high rate of speed, far in excess of seventeen miles per hour, and collided with great force and violence against said engine No. 6 and said passenger train No. 6, wrecking said engine and said train and sorely cutting, bruising, crushing, and otherwise injuring intervener in the manner and with the effects hereinafter alleged and described and without fault or negligence on his part.

That said freight train had left said station of Rockeby, moving northward over and along said railway toward and for said station of Hartford, at about and not before 12.33 p. m., having then insufficient time by many minutes to run said distance of 6.9 miles and arrive at Hartford station, take the siding there, and be out of the way of said passenger train five minutes before the same was due, or even to have run said distance at the speed allowed freight trains.

That said employés in charge of said freight train failed and were unable to move it over said distance within said time, and instead of being at said station of Hartford and meeting said passenger

train at that point at 12.45 p. m., was moving northward over and along said railway between said two stations at a high rate of speed, at a place where and at a time when said passenger train had the absolute right of way and track, unobstructed by any freight trains, cars, or engines.

That when about midway between said two stations said engineer, Alfred Wick, ordered said engine No. 147 to be cut loose from said train No. 58, and the same was uncoupled and cut loose therefrom and by him moved and run at a high rate of speed, far in excess of seventeen miles per hour, over and along said railway northward toward said station of Hartford, and upon the time and in the direction of said approaching passenger train.

That during all the period over which the said receivers continued to operate, manage, and control said railway, up to and during said third day of June, A. D. 1891, intervener was the servant and employé of said receivers, and discharging for them the duties of train baggageman, and on said third day of June and at the time of said collision and wreck was discharging his duties as such baggageman on said passenger train No. 9.

That among other duties enjoined upon intervener by said receivers as such baggageman it was his duty at all times to be in the baggage car attached to and comprising a part of said train, and take into said car and carefully care for and stow away therein all baggage taken on said train at the stations along said railway, and remove therefrom all baggage as it arrived at its place of destination.

That the baggage car forming a part of said train was telescoped, crushed in, and broken by said collision and wreck, and intervener, who was in said car at the time in the discharge of his duties as baggageman, was thrown with great force and violence against the sides of said car, and its contents and large packages of express matter and baggage fell upon him, from which he received the wounds following:

A severe cut on the right side of the forehead and extending back over the temple, a severe bruise extending from the right cheek down over the neck and right collar-bone to the breast-bone; the left shoulder-blade was broken; the muscles from the right shoulder-blade were greatly bruised; the walls of the thorax were crushed; the spinal column and spinal cord were greatly injured, and particularly in the region of the lower dorsal and lumbar vertebra; the articulations of the pelvis and the articulations of the pelvis with the spine were wrenched and sprained, all which disturbed the circulation, congested the lungs, and rendered respiration difficult and painful, impaired the power of motion, caused a general wasting and softening of the muscles, softening of the spinal cord, and complete paralysis of the legs and genital organs, weakened the sight, and otherwise greatly injured him, so that since receiving said injuries he has been continuously confined to his bed, to and from which he has had to be lifted, and cannot lie in any position other than on his back, and without rest and with but little sleep.

That said collision, said wreck, and the injuries sustained by intervener were caused and occasioned by the gross and culpable carelessness, negligence, and mismanagement of said receivers, their agents and employés, in this, to wit:

The starting of said freight train by said conductor, William Berry, from the said station of Rockeby for said station of Hartford, a distance of 6.9 miles, there being at that time not to exceed seven minutes in which to run said train over said distance and take the siding at Hartford and be out of the way of passenger train No. 9, nor time by several minutes to have run said distance by the speed allowed freight trains.

The moving and running of said freight train by said conductor, William Berry, and said engineer, Alfred Wick, over and along said railway northward from Rockeby to Hartford upon the time and in the direction of said approaching passenger train.

The failure of said conductor, William Berry, and Engineer Alfred Wick to stop said freight train and said engine No. 147 and put out and place or have out and placed upon said track red flags and torpedoes to signal and warn said approaching passenger train, as it was their duty to have done, as they and each of them well knew that said freight train was running off its time and running upon the time and in the direction of said approaching passenger train.

The action of Engineer Alfred Wick in ordering cut loose and the cutting loose and uncoupling of said engine No. 147 from said freight train No. 58 and moving and running said engine northward over and along said railway at a rate of speed far in excess of seventeen miles per hour upon the time and in the direction of said approaching passenger train.

That one J. D. Hollister, who was at the time herein mentioned up to July 1st, A. D. 1891, general claim agent for said receivers and since said date and now is the general claim agent of the Missouri, Kansas and Texas Railway Company and by said receivers and said company authorized to settle and adjust the claim of intervener herein set forth, has at various times since said claimant's and intervener's said injury negotiated with him looking to a settlement of said claim, but has failed to consummate such settlement from an inability to agree upon the amount to which intervener is entitled.

That intervener is forty-eight years of age, the head of a family consisting of a wife and four children, and prior to receiving said injuries was a strong, healthful, rugged man, and has been in the discharge of the duties of train baggageman and in connection -herewith handling the express matter carried upon the said Missouri, Kansas and Texas railway when the same was operated by the Missouri Pacific Railway Company, and continued the duties of said position when said railway was placed in the charge of said receivers and over a period of eight full consecutive years, and at the time of sustaining the injuries aforesaid and for a long time prior thereto was earning and receiving seventy dollars per month, and his services were reasonably worth said sum.

That by reasons of said injuries so sustained as aforesaid intervener is permanently disabled and rendered unable to do any work or perform the duties of train baggageman, and is thereby incapacitated from earning a livelihood and supporting himself and family, wholly dependent upon his personal earnings, and has suffered and continues to suffer great and severe bodily pain and mental anguish, and without rest and but little sleep, lying helplessly upon his back, and will be continuously required and compelled to employ attendants to wait upon and administer to his wants and necessities, all to his great damage, in the sum of twenty-five thousand dollars.

That intervener, in his helpless condition, has been compelled to and has employed nurses and attendants to wait upon and administer to his wants and necessities, and has paid and incurred the liability to pay them for said services the reasonable sum of three hundred dollars.

That intervener has been compelled to and has employed a physician to attend upon him and has paid and incurred the liability to pay therefor and for said services the reasonable sum of three hundred dollars.

That intervener has been compelled to and has purchased medicines prescribed for him by said physician and has paid and incurred the liability to pay therefor the reasonable sum of one hundred dollars.

That intervener has been unable to work or to perform any labor since sustaining said injuries, and has lost the value of his services for the past six months, of the reasonable value of seventy dollars per month, and has thereby sustained damage in the sum of four hundred and twenty dollars.

In the aggregate intervener has been damaged by reasons of the injuries so sustained by him as aforesaid in the great sum of twenty-six thousand one hundred and twenty dollars.

Wherefore intervener prays that he may have and recover of and from George A. Eddy and Harrison C. Cross, as receivers of the railway and property of the Missouri, Kansas and Texas Railway Company, the sum — $26,120.00, his damages so as aforesaid sustained, and that provisions be made by this court for its payment, and for such other and further relief as intervener may be entitled.

W. B. GLASS,
W. D. ATKINSON,
Attorneys for Intervener.

Verification.

STATE OF KANSAS, }
Labette County, } ss:

John E. Hornsby, of lawful age, upon his solemn oath says that he is the identical John E. Hornsby, claimant and intervener, mentioned and named in the above-attached and foregoing petition of intervention; that he has read the same and knows the contents thereof, and that the matters and things therein stated are true.

JOHN E. HORNSBY.

Subscribed in my presence and sworn to before me this 10th day of December, A. D. 1891.

[SEAL.] L. J. BEAGLE,
Notary Public.

My commission expires September 26th, 1895.

Indorsed: No. 6181. In the circuit court of the U. S. for dist. of Kans., eighth circuit. In equity. The Mercantile Trust Company, complainant, against The Missouri, Kansas & Texas Railway *et al.* Petition of intervention of John E. Hornsby. Filed December 15, 1891. Geo. F. Sharitt, clerk circuit court.

(Record, page 10.)

Cost Bond of John E. Hornsby, Intervener.

In the Circuit Court of the United States for the District of Kansas, in the Eighth Circuit. In Equity.

THE MERCANTILE TRUST COMPANY, Complainant,
against
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company, Defendants; John E. Hornsby, Intervener. } No. 6181.

Whereas John E. Hornsby has this day filed his petition of intervention in the above-entitled cause against George A. Eddy and Harrison C. Cross, as receivers of the railway and property of the Missouri, Kansas and Texas Railway Company, to recover damages for personal injuries sustained by him while an employé of said receivers:

Now, therefore, we, the undersigned, do hereby undertake and agree to pay all costs in said action that may be legally assessed against the said John E. Hornsby, intervener.

Witness our hand- this — day of December, A. D. 1891.

JNO. E. HORNSBY. [SEAL.]
GEO. W. GABRIEL. [SEAL.]
W. C. HOLMES. [SEAL.]
T. M. FLYNN. [SEAL.]

Indorsed: Filed Dec. 15, 1891. Geo. F. Sharitt, clerk.

(Record, page 10.)

Order Book "F." Jan. 4, 1892.

MERCANTILE TRUST COMPANY
vs.
MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *et al.* } No. 6181.

Now comes the Missouri, Kansas and Texas Railway Company, by T. N. Sedgwick, its solicitor, and enters its appearance to the petition of intervention of John E. Hornsby filed herein.

(Record, page 11.)

Amended Answer to the Petition of Intervener.

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and The Missouri Pacific Railway Company, Defendants; John E. Hornsby, Intervener. } No. 6181.

In the matter of the claim of said intervener against George A. Eddy and Harrison C. Cross, receivers of said Missouri, Kansas and Texas railway.

Come now George A. Eddy and Harrison C. Cross, late receivers of the Missouri, Kansas and Texas railway, and reserving the right to make objection in proper form, by demurrer or otherwise, to the sufficiency of said petition of intervention, by reason of its many manifest inaccuracies and failure to state facts sufficient to constitute a petition for intervention, and for answer to said petition say that they were appointed receivers of the Missouri, Kansas and Texas railway, as alleged in said petition of intervention, and admit that a collision occurred between an engine of freight train No. 58 and passenger train No. 9 on the day — at the place alleged in said petition of intervention, but these defendants deny specifically that such collision was caused through any negligence whatever of these defendants, either personally or through the negligence of any of their employés, agents, or servants of these defendants as such receivers, as alleged in said petition of intervention.

These defendants further deny that said intervener was injured to the extent and in the manner stated in said petition of intervention, or that he suffered the mental anguish or physical pain as stated by him in his petition of intervention.

And these defendants further deny that he received any but slight injuries, to wit:

A cut on the right side of the forehead and extending back over the temple; a severe bruise extending from the right cheek-bone back down over the neck and right collar-bone to the breast-bone; and these defendants specifically deny that the left shoulder-blade was broken; that the muscles from the right shoulder were greatly bruised, and that the walls of the thorax were crushed; that the spinal column and spinal cord were greatly injured, and particularly in the region of the lower dorsal and lumber vertebræ; and they further deny that the articulations of the pelvis and the articulations of the pelvis with the spine were wrenched and sprained, and deny that any injuries which intervener received affected the circulation, congested the lungs, and rendered respiration difficult and painful, impaired the power of motion, or caused a general wasting and softening of the muscles, softening the spinal cord, and complete paralysis of the legs and genital organs, or that his sight was weakened or impaired thereby, or that he was otherwise in-

jured, or that since said time he has been continuously confined to his bed, to and from which he had to be lifted, and cannor lie in any position other than on his back, and without rest and with but little sleep.

These defendants specifically deny that they were guilty of gross carelessness or culpable negligence or mismanagement, either personally or by their agents, servants, or employés, and they specifically deny that said freight train left the station of Rockebye at 12.33 o'clock, but allege the fact to be that said freight train left the station at Rockebye at the hour 12 m., giving it 45 minutes in which to run a distance of 6.9 miles, and which was sufficient time in which to make said run.

These defendants specifically deny that the moving and running of said freight train by said William Berry, conductor, and Alfred Wicks, engineer, over and along said railway from Rockebye to Hartford was upon the time of the approaching passenger train, or that said act of said engineer and the said conductor was in anywise negligent, and they specifically deny that the failure of said William Berry, conductor, and Alfred Wicks, engineer, to put out flags or have flags put out and placed upon said track, or otherwise signal or warn said approaching passenger train, was negligence.

These defendants specifically deny that the act of said Alfred Wicks, engineer, in cutting said engine loose from said freight train and moving and running said engine over and along said track at the rate of speed at which he did move and run said engine was negligent.

These defendants specifically deny that any other act performed by said conductor, William Berry, or said engineer, Alfred Wicks, or any other of their agents, servants, or employés, in any way or manner contributed to the accident and wreck or in any way or manner contributed to the injuries which intervener received.

These defendants admit that J. D. Hollister was at the time of said accident and injury the general claim agent of these defendants upon said line of road, and they further admit that he did negotiate and communicate with said intervener regarding an adjustment of his pretended claim against these defendants as receivers of said road; and these defendants allege the fact to be that neither themselves nor the said Hollister have in any manner admitted a legal liability in favor of this intervener and against these defendants because of said accident and wreck or because of the injuries which the said intervener claims to have received, but it was because of the fact that the said Hollister could not recognize a legal liability in favor of the intervener and against these defendants growing out of the circumstances attending said wreck and the injuries received by said intervener that he failed to make an adjustment of the matter.

And these defendants further allege and show to the court that all the allegations in the petition of the intervener regarding the action of said J. D. Hollister are impertinent and immaterial and should not have been stated, and should be stricken out of said pe-

tition of intervention as impertinent and immaterial, and these defendants now and here ask the court to strike out of said petition of intervention all allegations regarding the actions of said J. D. Hollister as said general claim agent because of said impertinence and irrelevancy.

These defendants allege and show to the court that the injuries received by the intervener, if any he received, were but slight and easily cured, and that the same have healed, and that said intervener is now well, and if for any reason he is unable to work it is because of a disinclination to do so and not because of any permanent injuries which he received in said collision and accident.

These defendants further allege and show to the court that the said William Berry, conductor, and said Alfred Wicks, engineer, of said freight train, were railroad men of many years' experience, and were cautious, prudent, and careful in the discharge of their duties, and that the acts of said William Berry and Alfred Wicks complained of by the intervener were not in any sense negligent, as alleged, and were not the cause of the accident, as alleged by the intervener in his petition; but these defendants allege and show to the court that said accident was caused by the act of God and could not have been prevented by these defendants, nor by the agents, servants, or employés of these defendants by any reasonable or proper care which these defendants, their agents, servants, or employés, were bound to exercise.

These defendants further allege and show to the court that said accident was caused by the fact that said freight train was very heavily loaded and by the inclemency of the weather and great floods caused by heavy rains; that because thereof said train was compelled to move cautiously, which it was doing; that after leaving the station of Rockebye it became apparent to both said William Berry and Alfred Wicks that owing to the heavy *rain* train they were hauling and the incapacity of the engine to make steam because of the continuous rain, that said freight train could not reach Hartford in time to enter the siding before the arrival of said passenger train, and thereupon the said engineer, Alfred Wicks, without the knowledge or consent of said conductor, William Berry, detached said engine from said train by causing same to be uncoupled therefrom, and proceeded on to the station of Hartford with said engine, leaving the train behind. At the time said engine was detached and started for the station of Hartford it had ample time to make the station of Hartford and take the siding before the arrival of said passenger train, and owing to the heavy condition of said freight train it would have been impossible to have backed the same into Rockebye; that having sufficient time to make the station of Hartford it was not necessary to send a flagman ahead of said engine as it proceeded to Hartford; that after cutting loose from said freight train and starting for the station of Hartford there came a tremendous storm or cloud-burst, which nearly blew the engine off the track and made it almost impossible to move, and said engine could only move by pulling the throttle wide open and giving her all the steam possible, because of the fact that said strom

came in the face of the engine, and to move forward it had to overcome the resistance of the storm, which storm made it impossible for a human being to run ahead of the engine, and that by reason of said cloud-burst and storm said engine was prevented from proceeding, and also it prevented a flagman from proceeding ahead of the engine to flag the passenger train; that said cloud-burst and storm ceased as suddenly as it commenced, and that just as said cloud-burst ceased and passed over, said engine, being under full head of steam, shot out and started forward with great and uncontrollable speed, and just at that time the passenger train appeared, also under full head of steam. The said Alfred Wicks reversed his engine and made every effort to stop, but so great was the momentum thereof it was impossible to prevent the collision with the passenger train; and these defendants further allege that the engineer of the passenger train reversed his engine and made every effort to stop, but so great was the momentum thereof that it was impossible to do so.

These defendants further allege and show to the court that the intervener, if he was in the employ of these defendants, assumed all risks incident to his employment, and the injury, if any he received, was because of an accident and collision caused in the manner as hereinbefore stated and by the agencies herein alleged, and over which these defendants, their agents, servants, or employés, had no control whatever, and that the cloud-burst and storm was wholly unknown to the employés of the passenger train.

These defendants further allege and show to the court that if it had not been for said storm and cloud-burst said engine would have reached the station of Hartford in ample time to have taken the siding before the arrival of said passenger train at said station.

These defendants further allege and show to the court that said accident occurring at the time and place alleged in said petition of intervention, if caused by negligence, as alleged in said petition of intervention, and which these defendants have herein specifically denied and do deny, such negligence was that of the said Alfred Wicks, engineer of said freight train No. 58; that he was a co-employé of the intervener, if the intervener was an employé of these defendants; that under the laws of Kansas the defendants, as such receivers, are not liable for an injury occurring to one of their employés through the negligence of another employé or the mismanagement of their engineers; and these defendants allege that there is a statute in Kansas which reads as follows:

"Every railroad company organized and doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés to any person sustaining such damage." Section 1251, chapter 23.

But said section has no application to individuals who may be operating railroads, either as receivers or otherwise, and consequently has no application to these defendants as such receivers, and there is no other statute or law which, either in terms or by implication, makes these receivers liable to the intervener for the injuries which

he may have received through the negligence of any of his co-employés.

These defendants allege, as to whether intervener was an employé of theirs or not, that the facts are:

Said intervener was in the employ of the Pacific Express Company, a corporation legally and duly organized under the laws of the State of Nebraska and doing business on the line of the Missouri, Kansas and Texas railway as a carrier of freight; that under and by virtue of a contract made by and between said Pacific Express Company and these defendants, as receivers of the Missouri, Kansas and Texas railway, its employés, managers, clerks, and guards, etc., were to be carried free of charge; that in consideration therefor all moneys, packages, and other freight which it became necessary for these receivers to transfer by express over the lines of the Missouri, Kansas and Texas railway or other lines of road were to be carried by said express company free of charge; that the said intervener was an employé of said express company, and by a contract between the express company and these receivers, defendants herein, intervener was also to handle the baggage of these defendants upon the line of road where he was running at the time of the accident—that is to say, he was to handle both the packages of these defendants and the express matter for the Pacific Express Company; that by virtue of said contract between the Pacific Express Company and these defendants these defendants were not to be liable for any injuries which the messengers, clerks, guards, etc., should receive by reason of any accident occurring on the lines of the railroad operated by these defendants, whether said accident or injury should be caused by the negligence of these defendants, their agents, servants, or employés, or otherwise; that the said John E. Hornsby entered the employ of the Pacific Express Company with full knowledge of the existence of said contract, and that by reason thereof he was bound by the terms and conditions of the same.

And these defendants further allege and show to the court that they are not liable for such injuries, whether the said John E. Hornsby be considered an employé of these defendants or the Pacific Express Company, for the reason hereinbefore stated.

That said receivers further allege and show to the court that the trains on the line of their road are operated solely under the control, charge, and management of the conductors thereof, and that the engineer has no authority whatever to detach an engine or to stop a train or to move forward or backward or to do anything with the train independent of the order of the conductor, and that if the said engineer, Alfred Wicks, as alleged, cut the said engine loose from said train said act was wholly without any authority conferred upon him, the said Alfred Wick, as engineer of said trains, and said act was wholly unauthorized by said conductor, William Berry, or ony ane else having any authority to order and direct the movements or disposition of said train or any detachment of the same; that all facts stated in the petition of intervener, John E. Hornsby,

not herein specifically admitted, qualified, or otherwise stated are hereby specifically denied.

Wherefore these defendants pray that this action be dismissed, and that they recover their costs herein expended.

T. N. SEDGWICK,
Attorney for Defendants.

STATE OF KANSAS, } ss:
County of Labette, }

T. N. Sedgwick, of lawful age, being first duly sworn, deposes and says that he is the attorney for the defendants, Geo. A. Eddy and Harrison C. Cross, late receivers of the Missouri, Kansas and Texas railway in the above action; that he has read the above and foregoing answer, and that the facts as therein stated are true, as he is informed and believes.

T. N. SEDGWICK.

Sworn to and subscribed before me this 20th day of July, 1892.
[SEAL.] JAMES R. SCOTT,
Notary Public.

My commission expires November 13th, 1895.

Indorsed: Mercantile Trust Company, compl'nt, *vs.* M., K. & T. R'y Co. *et al.*, def'ts. Eddy and Cross, receivers M., K. and T. R'y. John E. Hornsby, intervener. We hereby consent to the filing of the within amended answer. W. B. Glasse and W. S. Atkinson, att'ys for intervener. Amended answer. Filed July 25, 1892. Geo. F. Sharitt, clerk. In the circuit court of the United States for the district of Kansas, in the eighth circuit. In equity.

(Record, page 17.)

Reply of (Intervenor) John E. Hornsby to Amended Answer.

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Defendant, JOHN E. HORNSBY (Intervenor). } No. 6181.

In the matter of the claim of said (intervenor) against George A. Eddy and Harrison C. Cross, as receivers of the Missouri, Kansas and Texas railway.

And now comes John E. Hornsby (intervenor) in the above-entitled action, and for reply to the amended answer of defendants George A. Eddy and Harrison C. Cross, as receivers of the Missouri, Kansas and Texas railway, says—

That he specifically denies that said freight train left the station of Rockebye at the hour of 12 m.; denies that said train had sufficient time to make said run to Hartford station.

(Intervener) specifically denies the allegations, averments, and statements in said answer, and each and every of them, which are

in the words following, to wit: "And these defendants allege the fact to be that neither themselves or the said Hollister have in any manner admitted a legal liability in favor of the (intervenor) and against these defendants because of said accident and wreck or because of the injuries which the said (intervenor) claims to have received; but it was because of the fact that the said Hollister could not recognize a legal liability in favor of the (intervenor) and against these defendants, growing out of the circumstances attending said wreck and the injuries received by said (intervenor), that he failed to make an adjustment of the matter."

(Intervenor) specifically denies the allegations in said answer, to wit, "These defendants allege and show to the court that the injuries received by the (intervenor), if any he received, were but slight and easily cured, and that the same have healed, and that said (intervenor) is now well, and if for any reason he is unable to work it is because of a disinclination to do so, and not because of any permanent (in-uries) which he received in said (collission) and accident."

(Intervenor) specifically denies that said William Berry, conductor, and said Alfred Wicks, engineer, of said freight train, were railroad men of many years' experience and were cautious, prudent, and careful in the discharge of their duties; denies that their acts complained of by him in his petition were not negligent and not the cause of the injuries to (intervenor); specifically denies that said (collission), said wreck, and the injuries sustained by him were caused by the act of God; denies that said (collission), said wreck, and the injuries sustained by him could not have been prevented by defendants, their agents, servants, and employés, by any reasonable and proper care which they were bound to exercise.

Saving the facts that said freight train was heavily loaded, and that it became apparent to both said William Berry and Alfred Wicks that said freight train could not reach Hartford in time to enter the siding before the arrival of said passenger train, and that said engine at the time of said (collission) and wreck was under full head of steam, and that said freight engine was detached from said freight train and proceeded on toward the station of Hartford, leaving the train behind, (intervenor) specifically denies each, all, and every allegation, averment, and statement contained in that portion of defendants' answer which *are* in the words following, to wit: "These defendants further allege and show to the court that said accident was caused by the fact that said freight train was very heavily loaded and by the inclemency of the weather and great floods caused by heavy rains; that because thereof said train was compel-ed to move cautiously, which it was doing; that after leaving the station of Rockebye it became apparent to both said William Berry and Alfred Wicks that owing to the heavy train that they were hauling and the incapacity of the engine to make steam because of the continuous rain that said freight train could not reach Hartford in time to enter the siding before the arrival of said passenger train, and thereupon the said engineer, Alfred Wicks, without the

knowledge or consent of said conductor, William Berry, detached said engine from said train by causing the same to be uncoupled therefrom and proceeded on to the station of Hartford with said engine, leaving the train behind. At the time said engine was detached and started for the station of Hartford it had ample time to make the station of Hartford and take the siding before the arrival of said passenger train, and, owing to the heavy condition of said freight train, it would have been impossible to have backed the same into Rockebye; that, having sufficient time to make the station of Hartford, it was not necessary to send a flagman ahead of said engine as it proceeded to Hartford; that after cutting loose from said freight train and starting for the station of Hartford there came a tremendous storm or cloud-burst which nearly blew the engine off the track and made it almost impossible to move, and said engine could only move by pulling the throttle wide open and giving her all the steam possible, because of the fact that said storm came in the face of the engine, and to move forward it had to overcome the resistance of the storm, which storm made it impossible for a human being to run ahead of the engine, and that by reason of said cloud-burst and storm said engine was prevented from proceeding, and also it prevented a flagman from proceeding ahead of the engine to flag the passenger train; that said cloud-burst and storm ceased as suddenly as it commenced, and that, just as said cloud-burst ceased and passed over, said engine, being under full head of steam, shot out and started forward with great and uncontrollable speed, and just at that time the passenger train appeared, also under full head of steam. The said Alfred Wicks reversed his engine and made every effort to stop, but so great was the momentum thereof it was impossible to prevent the (collission) with the passenger train, and these defendants further allege that the engineer of the passenger train reversed his engine and made every effort to stop, but so great was the momentum thereof it was impossible to do so."

(Intervenor) specifically denies that he assumed all risk incident to his employment; denies that the (collission) or the injuries received by him were caused by the agencies alleged by defendants in their answer, and over which said defendants, their agents, servants, and employés, had no control; denies that any storm or cloud-burst prevented said freight train or said engine from reaching the station of Hartford in time to have taken the siding before the arrival of said passenger train; specifically denies that there was any storm or cloud-burst. (Intervenor) admits that he and the said Alfred Wicks were co-employés and in the employ of said defendants at the time of said (collission), said wreck, and the receiving of the injuries sustained by him as averred in said answer; and with reference to the allegation in said answer that said (collission) and wreck was the result of gross and culpable negligence and mismanagement of said engineer, Alfred Wicks, alone, (intervenor) here reaffirms the allegations of his petition and avers that said (collission), said wreck, and the injuries sustained by him were caused and occasioned by the gross and culpable negligence and mismanagement

of both said conductor, William Berry, and engineer, Alfred Wicks, but (intervenor) says that it may be possible that said (collission), said wreck, and the injuries sustained by him were caused by the gross and culpable carelessness, negligence, and mismanagement of said engineer, Alfred Wicks, alone.

(Intervenor) admits that there is a statute of the State of Kansas as averred and set out in said answer, and avers that said statute applies to individuals and receivers operating railways in said State and to these defendants as receivers, as do all other laws of the State of Kansas applicable to railroad companies.

(Intervenor) admits that at the time of said (collision) and wreck and the receiving of his said injuries complained of in his petition and for some time continuously prior thereto he was and had been in the employ of the Pacific Express Company and handled such of its express matter as was carried on said passenger train; but avers the fact to be that he was at the same time in the employ of said defendants and handling for them all the baggage carried on said passenger train, and was so in the employ of said receivers, defendants above named, at the time of and for a long time prior to said (collission), said wreck, and the receiving of the injuries sustained by him; that he received from each of his said employers the sum of $35 per month, receiving in the aggregate for his services the sum of $70 per month.

(Intervenor) specifically denies that he ever had any knowledge of the contract stated and averred in defendants' answer as between the Pacific Express Company and said defendants as receivers, and denies that there was any such contract between them.

(Intervenor) here affirming all the allegations of his petition with reference to the mismanagement by said engineer, Wicks, of his said engine, and saving the allegation that said engineer, Wicks, had no authority whatever to detach his said engine from said train without the order of said conductor, Berry. (Intervenor) denies each and every allegation and averment in that part of said answer which is in the words following: "The said receivers further allege and show to the court that the trains on the line of road are operated solely under the control, charge, and management of the conductors thereof, and the engineer has no authority whatever to detach an engine or stop a train or to move forward or backward or to do anything with the train independent of the order of the conductor, and that if the said engineer, Alfred Wicks, as alleged, cut the said engine loose from said train said act was wholly without any authority conferred upon him, the said Alfred Wicks, as engineer of said train, and said act was wholly unauthorized by said conductor, William Berry, or any one else having any authority to order and direct the movements or disposition of said train or any detachment of the same."

(Intervenor), for further reply to the amended answer of defendants filed herein, here reaffirms each, all, and every of the allegations of his petition of intervention filed herein, and, save as to the admissions herein made, denies each and every allegation, aver-

ment, and statement in said amended answer contained inconsistent with the averments of his said petition.

W. B. GLASSE AND
W. D. ATKINSON,
Attorneys for (Intervenors).

STATE OF KANSAS, } ss:
Labette County, }

John E. Hornsby upon his solemn oath says—
That he is the claimant and (intervenor) mentioned and named in the above and foregoing reply to defendants' amended answer; that he has read said reply and knows the contents thereof; that the averments, statement, denials, matters, and things therein contained are true.

JOHN E. HORNSBY.

Subscribed and sworn to before me this 29th day of July, A. D. 1892.

[SEAL.] IRA F. ADAMS,
Notary Public.

My commission expires April 8th, 1895.

Indorsed: No. 6181. In the circuit court of the United States for the district of Kansas, eighth circuit. In equity. The Mercantile Trust Company, complainant, *vs.* The Missouri, Kansas and Texas Railway Co. and The Missouri Pacific Railway Co., defendants; John E. Hornsby (intervenor). Reply of (intervenor) John E. Hornsby to amended answer of defendant. Filed Aug. 1st, 1862. Geo. F. Sharitt, clerk. July 29th, 1892. I hereby waive the time of and consent to the filing of this reply. T. N. Sedgwick, attorney for receivers.

(Record, page 22.)

In the Circuit Court of United States, Northern Div., Dist. of Kansas.

JOHN E. HORNSBY (Intervenor)
vs.
GEO. A. EDDY and HARRISON C. CROSS, Receivers, &c., Def'ts.

Comes now the said Geo. A. Eddy and Harrison C. Cross, receivers in the above cause and defending the above action, and move the court to refer the issues joined in the above cause to a master, with instructions to find and report on both the law and the facts thereof.

T. N. SEDGWICK,
Attorney for Eddy & Cross.

Indorsed: No. 6181. Motion. Filed Feb. 10, 1894. Geo. F. Sharitt, clerk.

(Record, page 22.)

Order of court overruling the motion of Geo. A. Eddy & H. C. Cross, receivers in the above cause, to refer the claim set forth in the intervening petition of John E. Hornsby in the above cause and issues joined thereon to a master.

In the Circuit Court of the United States for the District of Kansas.

THE MERCANTILE TRUST CO.
against
THE MO., KAN. & TEX. R'Y CO. *et al.*

And now, on this 10th day of Feb'y, A. D. 1894, at an adjourned sitting of this court, at Topeka, Kansas, came Geo. A. Eddy & Harrison C. Cross, receivers in the above cause, and present their motion to the court to refer the claim of John E. Hornsby against them as set forth in the intervening petition of said Hornsby and the issues joined thereon to a master, which said — was opposed by said Hornsby, and after hearing argument of counsel thereon and being fully advised in the premises the same is overruled by the court; to which ruling of the court in the overruling of said motion counsel for said receivers at the time duly excepted and excepts.

JOHN A. RINER, *Judge.*

Indorsed: No. 6181. Order. Filed Feb. 10, 1894. Geo. F. Sharitt, clerk.

(Record, page 23.)

Motion.

In the Circuit Court of the United States, District of Kansas.

THE MERCANTILE TRUST COMPANY, Complainant,
against
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

In the matter of John E. Hornsby, intervener, against George A. Eddy and Harrison C. Cross, as receivers of the Missouri, Kansas & Texas Railway, defendants.

Now comes said intervener, John E. Hornsby, by his attorneys, and moves the court to allow and call and empanel a jury to try the issues joined on his petition of intervention herein and to assess the damages in the matter of intervention for the reasons stated and shown by the pleadings incident to the intervention.

CASE & GLASSE AND
W. D. ATKINSON,
Attorneys for Intervener.

Indorsed: No. 6181. In U. S. cir. court. John E. Hornsby, intervener, *vs.* Geo. A. Eddy and Harrison C. Cross, as receivers, &c. Motion. Filed Feb. 10, 1894. Geo. F. Sharitt, clerk.

(Record, page 23.)

Order.

In the Circuit Court of the United States, District of Kansas.

THE MERCANTILE TRUST COMPANY, Complainant,
against
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY and THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

In the matter of John E. Hornsby, intervener, against George A. Eddy and Harrison C. Cross, as receivers of the Missouri, Kansas & Texas Railway, defendants.

Now, at this time, the matter of the intervention of John E. Hornsby came on for hearing on the motion of said intervener for an order allowing, calling, and empanelling a jury to try the issues joined on his petition of intervention herein and to assess his damages herein, and the intervener being represented by Messrs. Case & Glasse and W. D. Atkinson and the receivers, Messrs. Geo. A. Eddy and Harrison C. Cross, being represented by T. N. Sedgwick, their attorney, after hearing the arguments of counsel and being fully advised in the premises, the court sustained said motion and ordered that a jury be allowed, called, and empaneled to try the issues joined on the petition of intervention and assess the damages, if any shall be found; to which ruling, by and order of the court, the defendants at the time duly excepted.

JOHN A. RINER, *Judge.*

Indorsed: No. 6181. Order. Filed Feb. 10, 1894. Geo. F. Sharitt, clerk.

(Record, page 24.)

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 27th day of November, 1893, proceedings were had and appear of record in words and figures as follows, to wit:

THE MERCANTILE TRUST COMPANY OF NEW YORK, Plaintiff,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY Co. *et al.*, Defendant-. } 6181.

JOHN E. HORNSBY, Intervener,
against
GEO. A. EDDY & H. C. CROSS, as Receivers of the Property of the Missouri, Kansas and Texas Railway Company.

SATURDAY, *February* 10, 1894.

Now come the parties hereto, the intervener by Case & Glass and W. D. Atkinson, his attorneys, and the receivers by T. N. Sedgwick, their attorney; and also come a jury, to wit, J. G. Beymer, J. M. Watson, James Turner, David Dobson, J. C. Chase, S. W. Dodge, Samuel Hollister, Thomas Black, John Stevenson, Cyrus Allen, Alden E. True, and G. B. Falconer, twelve good and lawful men of the body of the district of Kansas, who, being duly impaneled and sworn to well and truly try the matters submitted to them in this action and a true verdict give according to the law and evidence, *and* thereupon the trial of this case is proceeded with and, not being concluded at the time of adjournment, the jurors are admonished by the court as to their duties herein, and the further hearing postponed until tomorrow.

(Record, page 25.)

UNITED STATES OF AMERICA, } *ss:*
District of Kansas,

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 27th day of November, 1893, proceedings were had and appear of record in words and figures as follows, to wit:

THE MERCANTILE TRUST CO. OF NEW YORK, Plaintiff,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY Co. *et al.*, Defendant-. } 6181.

JOHN E. HORNSBY, Intervener,
against
GEO. A. EDDY and H. C. CROSS, as Receivers of the Property of the Missouri, Kansas and Texas Railway Company.

MONDAY, *February* 12, 1894.

Now come the parties herein same as on yesterday, and the jurors impanelled herein being called and all being present, the trial of this cause is proceeded with and, not being concluded at the hour of adjournment, the jurors are admonished by the court as to their duties herein, and the further hearing postponed until tomorrow morning.

(Record, page 25.)

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, the 27th day of November, proceedings were had and appear of record in words and figures as follows, to wit:

THE MERCANTILE TRUST CO. OF NEW YORK, Plaintiff,
vs.
THE MISSOURI, KANSAS AND TEXAS RAILWAY CO. *et al.*, Defendant-. } 6181.

JOHN E. HORNSBY, Intervener,
against
GEO. A. EDDY and H. C. CROSS, as Receivers of the Property of the Missouri, Kansas and Texas Railway Company.

TUESDAY, *February* 13, 1894.

The jury heretofore empaneled to try the issues in this case, after hearing the evidence, argument of counsel, and the instructions of the court, retire under the charge of a sworn bailiff to deliberate upon their verdict. The hour of adjournment having arrived and the jury having failed to agree upon their verdict, it is ordered by the court that the jury remain in the charge of said sworn bailiff, and that court do now adjourn until tomorrow morning at 9 o'clock.

(Record, page 26.)

Verdict.

In the Circuit Court of the United States for the District of Kansas.

THE MERCANTILE TRUST CO. OF NEW YORK, Plaintiff,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY CO. *et al.*, Defendant-. } Case No. 6181.

JOHN E. HORNSBY, Intervener,
against
GEO. A. EDDY and H. C. CROSS, as Receiver- of the Property of the Missouri, Kansas and Texas Railway Company.

We, the jury in the above-entitled case, duly empaneled and sworn, upon our oaths find for the intervener and assess his damages at $15,000, and against Geo. A. Eddy and H. C. Cross, receivers as aforesaid.

S. H. DODGE, *Foreman.*

No. 6181. John Hornsby, intervener, *vs.* Geo. A. Eddy & H. C. Cross, receivers. Verdict. Filed February 14, 1894. Geo. F. Sharitt, clerk.

(Record, page 26.)

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, began and held at the city of Topeka, in said district, on Monday, the 27th day of November, 1893, proceedings were had and appear of record in words and figures as follows, to wit:

WEDNESDAY, *February 14th*, 1894.

Present: Hon. John A. Riner, judge.

THE MERCANTILE TRUST CO. OF NEW YORK, Plaintiff,
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY CO. *et al.*, Defendant-. } 6181.

JOHN E. HORNSBY, Intervener,
against
GEO. A. EDDY and H. C. CROSS, as Receivers of the Property of the Missouri, Kansas and Texas Railway Company.

The jury heretofore empaneled to try the issues in this case now come into open court in charge of a sworn bailiff and return into open court their verdict in words and figures following, to wit: "In the circuit court of the United States for the district of Kansas. The Mercantile Trust Co. of New York, plaintiff, *vs.* The Missouri, Kansas & Texas Railway Co. *et al.*, defendant-; John E. Hornsby, intervener, against Geo. A. Eddy and H. C. Cross, as receivers of the property of the Missouri, Kansas and Texas Railway Company. We, the jury in the above-entitled case, duly empaneled and sworn, upon our oaths find for the intervener and assess his damages at $15,000, and against Geo. A. Eddy and H. C. Cross, receivers as aforesaid. S. H. Dodge, foreman."

And thereupon the court both now approve said verdict and order and adjudge that the said intervener, John E. Hornsby, have and recover of and from the said defendants, George A. Eddy and Harrison C. Cross, as receivers of the property of the Missouri, Kansas and Texas Railway Company, the sum of fifteen thousand dollars ($15,000.00), together with interest thereon at the rate of 6 per cent. per annum from this date, and also all costs herein expended by him, amounting to $——; and the property of said Missouri, Kansas & Texas Railway Company which was heretofore in the hands of said receivers and over which this court now holds jurisdiction shall remain liable for said sum and sums, and said receivers are hereby ordered to allow, audit, and pay said sum

and sums into the registry of this court for said intervener, John E. Hornsby; and if said receivers as such have not sufficient funds in their possession and under their control for that purpose, the property of said railway company remain liable therefore; to which order and judgment of the court the said defendants, George A. Eddy and Harrison C. Cross, as such receivers, at the time *expected.* It is further ordered that the said defendants, George A. Eddy and Harrison C. Cross, as such receivers, have sixty days from this date in which to prepare and present a bill of exceptions herein for allowance, and that execution in this case be stayed ten days from this date.

(Record, page 27.)

In the Circuit Court of the United States for the First Division of the District of Kansas.

MERCANTILE TRUST COMPANY, Complainant,
vs
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*, Respondents.

In the matter of the intervention of John E. Hornsby against George E. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas railway.

Come now the said George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas railway, and move the court to set aside the verdict rendered by the jury in favor of the said John E. Hornsby, intervener, and grant the said receivers herein a new trial, upon the grounds and for the reasons—

1st. That said verdict is excessive, the same being too large by $7,000.00.

2nd. Said verdict should have been for said receivers.

3rd. Said verdict was contrary to the evidence.

4th. Said verdict is not sustained by the evidence.

5th. The court misdirected the jury as to a material matter of law.

6th. The court wholly failed to direct the jury upon a material matter of law, as requested by the said receivers.

7th. The court should have sustained the objections made by the said receivers to the petition of the intervener, to wit, that the same did not state facts sufficient to constitute a cause of action.

T. N. SEDGWICK,
Att'y for said Receivers.

Indorsed: No. 6181. Mercantile Trust Company *vs.* Missouri, Kansas & Texas R'y Co. *et al.* John E. Hornsby, intervener. Motion for new trial. Filed Feb. 19, 1894. Geo. F. Sharitt, clerk.

(Record, page 28.)

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, began and held at *a* the city of Topeka, in said district, on Monday, the 27th day of November, proceedings were had and appear of record in words and figures as follows, to wit:

THE MERCANTILE TRUST COMPANY OF NEW YORK, Plaintiff,
vs.
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *et al.*, Defendants. } 6181.

JOHN E. HORNSBY, Intervener,
against
GEO. A. EDDY and HARRISON C. CROSS, as Receivers of the Property of the Missouri, Kansas & Texas Railway Co.

MONDAY, *February* 19, 1894.

The motion of George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas and Texas railway, to set aside the verdict rendered by the jury in favor of said John E. Hornsby, intervener, and for a new trial of this action, having been submitted to the court and duly considered, the court hereby overrules said motion.

* * * * * * *

(Record, page 143.)

And thereupon, both parties having rested, the receivers requested the court to give to the jury the following special instruction, to wit:

(Title omitted.)

No. 1. Gentlemen of the jury, the court instructs you that this action is brought under section 1251 of the General Statutes of Kansas, which reads as follows:

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage."

And as this statute applies only to railroad companies organized or doing business in the State and the employees of such companies, and does not apply to an individual or individuals who may be operating railroads, nor to the employees of such individual or individuals, and as the receivers, the defendants in this action, are not within the terms of the statute, and as the intervener was an employee of the receivers and not an employee of the railroad company, and as the party of whose acts he complains was also an employee of said receivers, defendants in this cause, and a fellow-servant or a co-employee of the intervener, the said intervener is not en-

titled to the benefit of said statute, and therefore your verdict must be for the defendants.

Which said instruction the court refused to give, and to the action of said court in refusing to give said instruction the said receivers at the time duly excepted and except, and the court gave no instruction or instructions of similar import or embracing the same proposition.

And thereupon the said receivers requested the court to give to the jury the following special instruction:

(Title omitted.)

No. 2. Gentlemen of the jury, the court instructs you that it is the intention of the law in cases of this kind to give compensation for the actual loss sustained by the injured party whenever he is found entitled to recover, and neither the *the* bodily injury nor mental anguish suffered by the intervener can be taken into account by you in estimating the amount of your verdict, if you should return one for him, and therefore, if you find that the intervener should recover in this action, in considering the amount of your verdict you must determine from all the evidence the amount, as near as it is possible for you to do so, of the actual loss sustained by him and return your verdict for such sum, and in determining the amount of such compensation you should consider the age of the intervener and the amount of salary or wages he was receiving at the time of his injury; and you will further consider the fact that he was past middle life, and that his capacity to earn money would decrease and not increase; that by reason of his age he was more liable to both accident and disease than would be the case if he were younger, and the uncertainty of his life, the uncertainty of his position, the fact that as his capacity to earn money decreased with his advancing years his wages and earnings would decrease in the amount thereof, and you should bear in mind that the policy of the law is not to improve a party's financial condition because of his injury, but simply to compensate him by providing for him to the same extent or as liberally as he would in all probability have provided for himself had he not been injured and not to enrich him because of such injury.

Which said instruction the court refused to give, and to the action of said court in refusing to give said instruction the said receivers at the time duly excepted and except, and the court gave no similar instruction to the jury or any instruction covering the same proposition.

And thereupon the said receivers requested the court — give the jury the following special instruction, to wit:

No. 3. Gentlemen of the jury, it is disclosed by all the evidence in this case that the engineer, Alfred Wicks, of whose act in detaching his engine from his train and attempting to run to the station of Hartford before the passenger train should leave there the intervener in this case complains, was a man careful and prudent in the discharge of his duties as such engineer. It is therefore my duty to instruct you that if you believe from the evidence in this

acse that on the occasion referred to the said Alfred Wicks in detaching his engine and running it to the station of Hartford in the manner he did used or exercised his best judgment, then his act, although resulting in injury to the intervener, would not be negligence, as negligence is the failure to exercise that care which an ordinarily prudent and careful man would exercise, and the fact that in the light of past events the injury might have been avoided had he acted differently does not make his conduct negligence, nor does the fact that a collision occurred and that intervener was injured raise any presumption of negligence in this case.

2. Gentlemen of the jury, I have already instructed you that negligence is in this case the failure to do what an ordinarily prudent and cautious man would have done under the same circumstances. It now remains for me to tell you further that in this case negligence is not presumed, but must be proven, and that the burden of proof is upon the intervener to establish the fact that he was injured and that such injury was the direct result of the negligence of the employés of the defendants, as claimed by him in his petition of intervention.

Which said instructions the court refused to give, and to the action of the said court in refusing to give to the jury the said instructions the said receivers at the time duly excepted and except, and the court gave no similar instruction or instructions covering the proposition of law embraced in the above.

And thereupon the said receivers requested the court to give to the jury the following special instruction, to wit:

No. 4. Gentlemen of the jury, I instruct you that if, by the rules of the company, the train is under the charge and control of the conductor, then and in that event he alone would have the right to order the engine detached and run on the track without the train to the station of Hartford, or if you find that under certain emergencies the conductor and engineer are to consent together as what was proper to be done, then and in that event neither would have authority to act without consultation with the other, then if you find from the evidence in this case that Engineer Wick, without orders or instructions from the conductor or without consultation with him, detached his engine from the train and, without orders or instructions from the conductor or without consultation with him and obtaining his consent so to do, attempted to run his engine along the track to the station of Hartford, and while so doing collided with the passenger train and the intervener was injured, then you must find for the defendants, the receivers.

Which said instruction the court refused to give to the jury, and to the action of said court in refusing to give said instruction to the jury the said receivers at the time duly excepted and except, and the court gave no similar instruction or instructions covering the propositions of law contained in the above request.

And thereupon the said receivers requested the court to give to the jury the following special instruction, to wit:

No. 5. Gentlemen of the jury, the court instructs you that the employees of the receivers in this case when they entered the service

assume certain risks incident to the business in which they were engaged, and that one of the risks so assumed is the risk of injury by reason of the unauthorized acts of the coservants or fellow-employees.

Therefore, if you find from the evidence that the engineer, Alfred Wick, in detaching his engine from his train and proceeding with it to the station of Hartford did so without consultation with or orders from the conductor of the train, who by the rules of the company is invested with the control and management of the same while on the road; that while doing so — collided with the passenger train and intervener was injured, such injury so received by the intervener and of which he complains in this case is one of the risks which he assumed when he entered the service of the receivers, and your verdict must be for the defendants herein.

Which said instruction the court refused to give to the jury, and to which action of the court in refusing to give to the jury said instruction the said receivers at the time duly excepted and except, and the said court gave no similar instruction or any instructions to the jury upon the propositions of law contained in the request last above.

Thereupon the said receivers requested the court to give to the jury the following instruction, to wit:

No. 6. "If the jury believe from the evidence that the injuries received by intervener were the result of the ordinary risks of the business in which he was engaged, then the verdict in this case must be for the defendant."

Which said instruction the court refused to give; to which action of the court in refusing to give said instruction the said receivers at the time duly excepted and except.

Thereupon the said receivers requested the court to give the jury the following instruction, to wit:

No. 7. "The jury are instructed that plaintiff assumed all the ordinary risks incident to the business in which he was engaged at the time he was injured and cannot recover damages for the injuries resulting from such assumed risks."

Which said instruction the court refused to give; to which action of the court in refusing to give said instruction the said receivers at the time duly excepted and except.

Thereupon the said receivers requested the court to give to the jury the following instruction, to wit:

No. 8. "Persons engaged in the operation of railroads assume all the ordinary risks incident thereto and cannot recover damages for injuries received in consequence of the risks so assumed by them."

Which said instruction the court refused to give; to which action of the court in refusing to give said instruction the said receivers at the time duly excepted and except.

Thereupon the said receivers requested the court to give to the jury the following instruction, to wit:

No. 9. "If the jury believe from the evidence that the employees in charge of the north-bound freight train in question used their best judgment under the circumstances as they then appeared in

attempting to run their train from Rockeby to Hartford, then the jury must find for the defendants, and this notwithstanding the final results may show the judgment exercised by the employees in charge of said freight train was erroneous and bad."

Which said instruction the court refused to give; to which action of the court in refusing to give said instruction the said receivers at the time excepted and except.

Thereupon the said receivers requested the court to give to the jury the following instruction, to wit:

No. 10. "Under the pleadings and testimony in this case the employees of defendant in charge of the freight train in question are to be considered as men of ordinary care and prudence."

Which said instruction the court refused to give; to which action of the court in refusing to give said instruction the said receivers at the time duly excepted and except.

Thereupon the said receivers requested the court to give the following instruction, to wit:

No. 11. "Employees in charge of railroad trains are not bound to exercise unerring judgment in the operation of their trains. If they are men of ordinary care and prudence and use their best judgment under the circumstances of each particular case, then they cannot be held negligent because their judgment may afterwards appear to have been erroneous."

Which said instruction the court refused to give; to which action of the court in refusing to give said instruction the said receivers at the time duly excepted and except.

Thereupon the said receivers requested the court to give the following instruction, to wit:

No. 12. "If you believe from all the evidence in this case that at the time the freight train left the station of Rockeby it had time to run to the station of Hartford, a distance of 6.9 miles, before the passenger train was due to leave said station, and that after leaving the station of Rockebye said freight train encountered a heavy wind which impeded its progress, rendering it reasonably certain to the engineer that he could not pull the train through, the act of leaving the station of Rockebye, even though a few minutes late, would not be negligence on the part of the train crew."

Which said instruction the court refused to give; to which action of the court in refusing to give said instruction the said receivers at the time duly excepted and except.

(Record, page 148.)

The court did instruct the jury generally that if they believed the action of the agents, servants, and employees of said receivers in charge of said freight train in cutting the engine loose from said train and in attempting to run the same to the station of Hartford with the intention of reaching said station before the passenger train should leave it were negligent, and that said action on the part of said employees resulted in the accident by which the intervener was injured, then it was their duty to find for the intervener

and against the receivers in such sum as they should think proper and right.

No. 20. The court further instructed the jury: "In determining the questions of liabilities I desire to say to you at the outset that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence two propositions: First, that the employees of the defendants engaged in operating the trains were negligent; and, second, that the plaintiff was free from negligence which contributed in whole or in part to the injuries of which he complains. You are the judges, the sole judges, of the weight of the evidence and the credibility of all the witnesses."

To the giving of which said instruction to the jury the said receivers then and there at the time duly excepted and except.

No. 21. All that the law requires of the defendants towards their employees is the exercise of such a degree of care and caution to prevent accident and injury to such employees as a person of ordinary care and prudence would exercise under like circumstances for the protection of his own person.

To the giving of which said instruction to the jury the said receivers then and there duly at the time excepted and except.

No. 22. A railroad company does not insure its employees against injuries resulting from accidents not caused by negligence of the company or by the negligence of co-employees of the person injured. In other words, a railroad company does not guarantee to an employee that the highest degree of care possible shall at all times be exercised on the part of the co-employees. All that the law requires of a railroad company is that it shall exercise that degree of care and caution to prevent injuries to its employees that a man of ordinary care and caution would exercise for the protection of his own person under like circumstances, and this rule applies equally to receivers when operating a railroad. They are only liable to the extent to which the company would be liable if operating the road.

To the giving of which said instruction to the jury the said receivers then and there at the time duly excepted and except.

No. 23. The mere fact that the plaintiff was injured, if you find from the evidence that he was injured, is not sufficient of itself to show negligence on the part of the defendant or their employés. You cannot infer negligence on the part of any person whatsoever from the mere fact that the plaintiff was injured.

The injury may have been purely accidental, and in that event there would be no liability.

To the giving of which said instruction to the jury the said receivers then and there at the time duly excepted and except.

No. 24. The fact that the defendants were operating the railroad cannot be considered by you for the purpose of enhancing or increasing the amount of damages which the plaintiff may be entitled to recover if you find from the evidence that he is entitled to recover any damages for the injuries alleged to have been sustained by him. To award any greater amount of damages against them for the reason that they were operating a railroad than would be allowed or awarded to a natural person to compensate one for injury sustained

through his negligence under like circumstances would be contrary to the policy, meaning, and intent of the law. You must determine this question the same as you would determine the question between two individuals from the evidence given on the trial of the cause.

To the giving of which said instruction to the jury the said receivers then and there at the time duly excepted and except.

No. 25. If your findings be for the plaintiff he is entitled to recover only such damages as naturally flow from and are the immediate result of the act complained of. You should be governed solely by the evidence introduced upon the trail, and you have no right, of course, to indulge in conjectures or speculation not supported by the evidence in the case; neither are you to be guided by any feeling of sympathy in the case; while you may sympathize with a person who is thus injured, it should not influence you in estimating the damages. The jury must be guided solely by the sworn evidence in the case.

To the giving of which said instruction to the jury the said receivers then and at the time duly excepted and except.

No. 25. If you find for the plaintiff he is entitled to recover for loss of time from business employment, loss of capacity to perform the kind of labor for which he was fitted, taking into consideration the kind of business in which he was engaged, and for physical pain suffered by him in consequence of his injury. In other words, he is entitled to recover for loss of earning power, which includes both the pecuniary loss which he has sustained and that which he is likely to sustain by reason of his injuries, with fair compensation for physical pain and suffering. Of course this you must estimate as best you can. It is a difficult matter to (*law*) down any definite rule, but depends largely on the good judgment of the jury to say what is fair and reasonable compensation for the pain and suffering.

To the giving of which said instruction to the jury the said receivers then and there at the time duly excepted.

No. 26. In case you find from the evidence that his injuries are of a permanent character, in estimating his damages you may take into consideration his expectancy of life, as shown by the evidence in the case. In estimating what damages would be proper if you find his injuries are permanent you may take into consideration and allow what you think would be fair and just compensation for his loss of earning power during his expectancy of life, as shown by the mortality tables offered in evidence.

I think, gentlemen, with these suggestions you will be able to properly dispose of the case and arrive at a just and fair conclusion.

To the giving of which said instruction to the jury the said receivers then and there at the time duly excepted and except.

* * * * * * *

(Record, page 152.)

Assignment of Errors.

In the Circuit Court of Appeals of the United States in and for the Eighth Circuit of the United States.

GEORGE A. EDDY & HARRISON C. CROSS, Receivers of Missouri, Kansas & Texas Railway Company, Pl'ffs in Error,
vs.
JOHN E. HORNSBY, Intervener.

Comes now the said Geo. A. Eddy and Harrison C. Cross, receivers of the said Missouri, Kansas & Texas Railway Co., and allege there is error in record and proceedings in the above-entitled matter, in this, to wit:

1st. The court erred in sustaining the motion of the intervener to refer the issue to a jury for trial.

2nd. The court erred in not sustaining the motion of the receivers to refer the issues in this case to a master to hear and try all questions of law and fact.

3rd. The court erred in ordering, calling, and empannelling a jury to try the issues in this cause.

4th. The court erred in not sustaining the objection made by the receivers to the introduction of any evidence under the petition of intervention or in support thereof because it did not state facts sufficient to constitute a cause of action.

5th. The court erred in permitting any evidence to be given to the jury by intervener upon his behalf in support of the allegations of his petition for the reason that said petition shows upon its face that the injuries of which (*said*) he complains, if any such were received, *was* the result of the negligence of a fellow-servant, and that section 1251 of the General Statutes of Kansas 1889, making railroad companies liable to a servant for injuries received through the negligence of a fellow-servant, only applies to railroad companies and has no application to the receivers of railroad companies.

6th. The court erred in permitting the intervener, as a witness upon his own behalf, to testify as to the extent and nature and effect of his own injuries.

7th. The court erred in admitting as evidence and *shown* to the jury the Carlisle tables of mortality, showing intervener's expectancy of life to be twenty-two and one-half years.

8th. The court erred in not sustaining objection of the receivers to the following question asked the intervener as a witness upon his own behalf, to wit:

"Before the commencement of this suit or while intervening in this cause had you any talk with Mr. Hollister in reference to your claim against the receivers?" and in permitting the answer to said question to be read to the jury.

9th. The court erred in sustaining the objection of the intervener to the following question asked by the receivers in the deposition

of witness J. C. Berry, to wit: "State whether or not you would have made the station of Hartford in time to have taken the siding for the passenger train if it had not been for the wind-storm that struck you," and in not permitting the answer thereto to be read to the jury.

10th. The court erred in sustaining the objection made by intervener to the following question asked by the receivers on the cross-examination of witness W. W. Cary, to wit: "Then, in going the distance of four miles on that occasion and making every effort it was possible to gain speed, he occupied as much time as it would have required to run from Rockeby to Hartford," and in refusing to permit the answer thereto to be read to the jury.

11th. The court erred in sustaining the objection of the intervener to the following question asked by the receivers in the deposition of witness Thomas Jones, to wit: "You may state whether the engine would have made the station of Hartford if it had not been for the wind," and in not permitting the answer to said question to be read to the jury.

12th. The court erred in sustaining the objection of the intervener to the following question asked by the receivers in the deposition of witness L. W. Welsh, to wit: "What would you say as to whether or not they should leave if they were ready to start away at 12.27 from the station of Rockeby?" and in refusing to permit the answer thereto to be read to the jury.

13th. The said court erred in refusing to give to the jury special instruction No. 1 requested by the receivers.

14th. The court erred in refusing to give to the jury special instruction No. 2 requested by the receivers.

15th. The court erred in refusing to give to the jury special instruction No. 3 requested by the receivers.

16th. The court erred in refusing to give to the jury special instruction No. 4 requested by the receivers.

17th. The court erred in refusing to give to the jury special instruction No. 5 requested by the receivers.

18th. The court erred in refusing to give to the jury special instruction No. 6 requested by the receivers.

19th. The court erred in refusing to give to the jury special instruction No. 7 requested by the receivers.

20th. The court erred in refusing to give to the jury special instruction No. 8 requested by the receivers.

21st. The court erred in refusing to give to the jury special instruction No. 9 requested by the receivers.

22nd. The court erred in refused to give to the jury special instruction No. 10 requested by the receivers.

23rd. The court erred in refusing to give to the jury special instruction No. 11 requested by the receivers.

24th. The court erred in refusing to give to the jury special instruction No. 12 requested by the receivers.

25th. The court erred in giving the jury instruction No. 20.

26th. The court erred in giving the jury instruction No. 21.

27th. The court erred in giving the jury instruction No. 22.

28th. The court erred in giving to the jury instruction No. 23.

29th. The court erred in giving to the jury instruction No. 24.

30th. The court erred in giving the jury instruction No. 25.

31st. The court erred in giving to the jury instruction No. 26.

32nd. The court erred in giving all said instructions from No. 20 to 26, inclusive, to the jury.

33rd. The court erred in refusing to give all instructions from 1 to No. 12, inclusive, requested by the said receivers to the jury.

34th. The court erred in rendering (judgement) in favor of the intervener.

35th. The court erred in refusing to render judgment in favor of the receivers.

36th. The court erred in not setting aside the verdict as excessive.

37th. The court erred in not modifying and reducing the amount of the verdict.

Wherefore the said Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas Railway Co., pray that the judgment of the circuit court of the United States in and for the 1st division of Kansas be reversed and they be restored to all things they have lost thereby.

A. L. WILLIAMS,
N. H. LOOMIS, AND
T. N. SEDGWICK,
Att'ys for Receivers.

Indorsed: No. 6181. John E. Hornsby, intervener, *vs.* Eddy & Cross, receivers. Assignment of errors. Filed Apr. 16, 1894. Geo. F. Sharitt, clerk.

(Record, page 155.)

In the Circuit Court of the United States for the First Division of the District of Kansas.

JOHN E. HORNSBY, Intervener,
against
GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants.

Come now George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas railway, by T. N. Sedgwick, their attorneys, and complain that in the record and proceedings and also in the rendition of the judgment in the said cause between John E. Hornsby, intervener, and the said George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas railway, as defendants, in the said United States circuit court for the first division of the district of Kansas, at the November, 1893, term thereof, and in which judgment was rendered against the said George A. Eddy and Harrison C. Cross, as such receivers, on the — day of February, 1894, for the sum of fifteen thousand dollars, and the said George A. Eddy and Harrison C. Cross, as such receivers, complain that a

manifest error hath intervened against them, the said George A. Eddy and Harrison C. Cross, as such receivers, as fully appears from the transcript of record and judgment in which cause herewith submitted.

Wherefore they pray for the allowance of a writ of error and such other proceedings as may cause same to be corrected by the United States circuit court of appeals for the eighth circuit.

T. N. SEDGWICK,
Attorney for George A. Eddy and Harrison C. Cross, Receivers of Missouri, Kansas & Texas Railway.

Indorsed: No. 6181. John E. Hornsby *vs.* Eddy & Cross. Petition for writ of error. Filed Apr. 16, 1894. Geo. F. Sharitt, clerk.

(Record, page 156.)

In the Circuit Court of the United States for the First Division of the District of Kansas.

JOHN E. HORNSBY, Intervener,
against
GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants.

Appeal and Allowance.

The above-named defendants, George A. Eddy and Harrison C. Cross, conceiving themselves aggrieved by the order entered on the — day of February, 1894, in the above-entitled cause, do hereby appeal from said order to the United States circuit court of appeals for the eighth circuit, and they pray that this their appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to said United States circuit court of appeals for said eighth circuit.

T. N. SEDGWICK,
Attorney for Receivers and Appellants, George A. Eddy and Harrison C. Cross.

TOPEKA, KANSAS, *April* 16, 1894.

Now, to wit, on this day, it is ordered that the appeal be allowed as prayed for.

JOHN A. RINER,
Circuit Judge.

Indorsed: No. 6181. John E. Hornsby *vs.* Eddy & Cross. Appeal & allowance. Filed Apr. 16, 1894. Geo. F. Sharitt, clerk.

(Record, page 156.)

Know all men by these presents that we, Geo. A. Eddy & H. C. Cross, as principals, and Lee Clark & H. C. Whitley, as sureties, are held and firmly bound unto John E. Hornsby, intervener, in

the full and just sum of five hundred dollars, to be paid to the said John E. Hornsby, interveners, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of April, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the November term, A. D. 1893, of the circuit court of the United States for the first division of the judicial district of Kansas, in a suit depending in said court between John E. Hornsby, intervener, plaintiff, and Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas and Texas R'y Co., defendants, judgment was rendered against the said Geo. A. Eddy and Harrison C. Cross, receivers as aforesaid, and the said Geo. A. Eddy and Harrison C. Cross, receivers as aforesaid, *has* obtained writ of error and appeal of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John E. Hornsby, intervener, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Geo. A. Eddy and Harrison C. Cross, receivers as aforesaid, shall prosecute said writ of error and appeal to effect and answer all *and* costs if they fail to make good said plea, then the above obligation to be void; else to remain in full force and virtue.

GEO. A. EDDY AND [SEAL.]
HARRISON C. CROSS, [SEAL.]
Receivers of the Missouri, Kansas & Tex. R'y Co.,
By T. N. SEDGWICK, *Their Att'y.* [SEAL.]
H. C. WHITLEY.
LEE CLARK.

Sealed and delivered in presence of—
—— ——.

Approved by—
JOHN A. RINER, *Judge.*

No. 6181. United States circuit court, first division of the judicial district of Kansas. John E. Hornsby, intervener, *vs.* George A. Eddy and H. C. Cross, receivers, etc. Bond, $500.00. Filed April 16, 1894. Geo. F. Sharitt, clerk.

(Record, page 157.)

UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceed-

ings in said court in the case of The Mercantile Trust Company of New York, complainant, *vs.* The Missouri, Kansas and Texas Railway Company *et al.*, defendants—John E. Hornsby, intervener—No. 6181. I further certify that the original citation and writ of error are returned herewith and are made a part of this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 17th day of May, A. D. 1894.

The Seal of the Circuit Court of the United States, District of Kansas, 1882.

GEO. F. SHARITT, *Clerk.*

Filed June 11, 1894.

JOHN D. JORDAN, *Clerk.*

(Record, page 159.)

And on the eleventh day of June, A. D. 1894, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

GEORGE A. EDDY *et al.*, Receivers, Plaintiffs in Error,
vs.
JOHN E. HORNSBY, Intervener.
} No. 488.

The clerk will enter my appearance as counsel for the plaintiff- in error, receivers.

T. N. SEDGWICK,
Att'y for Pl'ff- in Error.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 488. Geo. A. Eddy *et al.*, receivers, pl'ffs in error, *vs.* John E. Hornsby, intervener. Appearance. Filed Jun- 11, 1894. John D. Jordan, clerk. T. N. Sedgwick, Parsons, Kan., counsel for pl'ffs in error."

(Record, page 159.)

And on the thirteenth day of June, A. D. 1894, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE A. EDDY and HARRISON C. CROSS, as Receivers, Pl'ffs in Error,
against
JOHN E. HORNSBY, Intervener, Def't in Error.

Precipe entering appearing of counsel for def't in error.

The clerk of the court above named will please enter of record the

appearance of the undersigned as counsel for John E. Hornsby, intervener, def't in error, in the above-entitled cause:

W. B. GLASSE,
Columbus, Kansas.
NELSON CASE,
Oswego, Kansas.
W. D. ATKINSON,
Parsons, Kansas.

Endorsed: "No. 488. United States circuit court of appeals, eighth circuit. Geo. A. Eddy and Harrison C. Cross, pl'ffs in error, *vs.* John E. Hornsby, intervener, def't in error. Precipe entering appearing of counsel for def't in error. Filed June 13th, 1894. John D. Jordan, clerk."

(Record, page 160.)

And on the fifteenth day of October, A. D. 1894, a suggestion of the death of the plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas & Texas Railway Company, Plaintiffs in Error, *vs.* JOHN E. HORNSBY, Intervener, Defendant in Error.	In Error. No. 488.
GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas & Texas Railway Company, Appellants, *vs.* JOHN E. HORNSBY, Intervener, Appellee.	In Appeal. No. 489.

Comes now John E. Hornsby, intervener, defendant in error and appellee respectively in the above-entitled causes, by Case & Glasse and W. D. Atkinson, his attorneys of record, and suggest to the honorable court and aver that the above-named George A. Eddy and Harrison C. Cross, late receivers of the Missouri, Kansas & Texas Railway Company, are dead; that the said George A. Eddy died on the 5th day of September, A. D. 1894; that the said Harrison C. Cross died on the 6th day of September, A. D. 1894.

CASE & GLASSE AND
W. D. ATKINSON,
Attorneys for John E. Hornsby.

STATE OF KANSAS, } *ss:*
Labette County, }

W. D. Atkinson upon oath says that the statements above set forth are true.

W. D. ATKINSON.

Subscribed and sworn to before me this 12th day of Oct., A. D. 1894.

[SEAL.] C. W. RYAN,
Notary Public.

My commission expires October 20th, 1896.

(Record, page 161.)

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas & Texas Railway Company, Plaintiffs in Error, *vs.* JOHN E. HORNSBY, Intervener, Defendant in Error.	In Error.	No. 488.
GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas & Texas Railway Company, Appellants, *vs.* JOHN E. HORNSBY, Intervener, Appellee.	In Appeal.	No. 489.

To T. N. Sedgwick, attorney of record for plaintiffs in error and appellants in the above-entitled causes:

You will hereby take notice that at the city of St. Paul, in the State of Minnesota, on Wednesday, the 17th day of October, A. D. 1894, at the hour of 9 o'clock a. m. of said day or as soon thereafter as may be, and before the stipulation on file for a continuance of the above-entitled causes shall have been presented to said above-named court, intervener John E. Hornsby, by his attorneys of record, Case & Glasse and W. D. Atkinson, will cause to be presented and suggested upon the records of said court the death of the above-named George A. Eddy and Harrison C. Cross.

CASE & GLASSE AND
W. D. ATKINSON,
Attorneys for John E Hornsby.

The fact of the death of George A. Eddy and Harrison C. Cross is hereby admitted and service of the above notice acknowledged this 12th day of October, A. D. 1894.

T. N. SEDGWICK,
Attorney of Record for Receivers.

Endorsed: "In error, No. 488. In appeal, No. 489. United States circuit court of appeals, eighth circuit. George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas Railway Co., *vs.* John E. Hornsby, intervener. Suggestion of death of Messrs. Eddy & Cross and notice of presenting same. Filed Oct. 15, 1894. John D. Jordan, clerk."

(Record, page 162.)

And on the seventeenth day of October, A. D. 1894, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

GEORGE A. EDDY and HARRISON C. CROSS, Receivers, &c., Plaintiffs in Error,
vs.
JOHN E. HORNSBY, Intervener, Defendant in Error. } # 488.

In error to the circuit court of the United States for the district of Kansas.

WEDNESDAY, *October* 17, 1894.

This cause having been called for hearing in its regular order, counsel for defendant in error suggests the death of each of the plaintiffs in error and asks to have the same noted on the record; thereupon this cause was continued to the December term, 1894, in pursuance of the stipulation of the parties filed herein.

(Record, page 163.)

And on the twenty-sixth day of December, 1894, there was filed in the clerk's office of said circuit court of appeals a motion to substitute Henry C. Rouse receiver *de bonis non* instead of George A. Eddy and Harrison C. Cross, deceased; which, with the consent of counsel for defendant in error thereon, is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit of the United States.

GEORGE A. EDDY and HARRISON C. CROSS, Plaintiffs in Error,
against
JOHN E. HORNSBY, Intervener, Defendant in Error.

Motion.

Comes now T. N. Sedgwick, attorney for said plaintiffs in error, and moves the court to substitute Henry C. Rouse receiver *de bonis non* instead of said George A. Eddy and Harrison C. Cross, deceased.

T. N. SEDGWICK,
Attorney for said Receivers.

PARSONS, KANSAS, *Dec.* 22*nd*, 1894.

The undersigned, attorneys for John E. Hornsby, intervener, defendant in error in the above-entitled cause, hereby waive notice of the time of presentation and hearing of the above motion for the

substitution of Henry C. Rouse, receiver *de bonis non*, vice Eddy & Cross, deceased, and consent that the order of substitution may be made at any time not later than January 16th, 1895, the day set for the hearing of said cause, and in our absence the same to be without prejudice to any of the parties hereto.

CASE & GLASSE AND
W. D. ATKINSON,
Attorneys for John E. Hornsby, Intervener.

Endorsed: "No. 488. Eddy & Cross *vs.* John E. Hornsby. Motion to substitute H. C. Rouse receiver *de bonis non*, plaintiff in error, instead of Eddy & Cross, deceased, and consent — counsel for def't in error to substitution. Filed Dec. 26, 1894. John D. Jordan, clerk."

(Record, page 164.)

And on the third day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

GEORGE A. EDDY and HARRISON C. CROSS, Receivers, Plaintiffs in Error,
vs.
JOHN E. HORNSBY, Intervener, Defendant in Error. } #488.

In error to the circuit court of the United States for the district of Kansas.

THURSDAY, *January* 3, 1895.

Now, on this 3rd day of January, 1895, the above-entitled cause coming on to be heard upon the motion filed by T. N. Sedgwick, attorney for said George A. Eddy and Harrison C. Cross, plaintiffs in error, to substitute Henry C. Rouse receiver *de bonis non* in the place of said George A. Eddy and Harrison C. Cross, plaintiffs in error, who are now deceased, and it appearing to the court that the said Eddy and Cross are both deceased, and that they died since the filing of the petition in error and appeal in this cause, and that heretofore, on December 10th, 1894, the Honorable Amos M. Thayer, circuit judge of the eighth judicial circuit of the United States in an application duly presented by the Missouri, Kansas & Texas Railway Company, appointed the said Henry C. Rouse receiver *de bonis non* in place of George A. Eddy and Harrison C. Cross, deceased; that said order was made in cause #6181, entitled The Mercantile Trust Company, complainant, against The Missouri, Kansas & Texas Railway Company and others, respondents; it further appearing to the court by the motion of said T. N. Sedgwick that he desires the said Henry C. Rouse to be substituted in place of said George A. Eddy and Harrison C. Cross, and there appearing no good reason why said substitution should not be made as requested:

It is thereupon considered and ordered by the court, the defendant in error consenting thereto, that Henry C. Rouse, receiver *de bonis non*, be substituted for George A. Eddy and Harrison C. Cross as plaintiff in error in the above cause, and that said cause proceed to final determination in the name of Henry C. Rouse, receiver *de bonis non*, as plaintiff in error.

(Signed) HENRY C. CALDWELL,
Judge United States Circuit Court of Appeals for the Eighth Circuit of the United States.

(Record, page 166.)

And on the fourth day of January, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a motion to strike out certain assignments of error in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

HENRY C. ROUSE, as Receiver *de bonis non* (vice Eddy and Cross, Receivers, Deceased), Appellant and Plaintiff in Error,
against
JOHN E. HORNSBY, Intervener, Appellee and Defendant in Error.
} Nos. 488 and 489.

Motion.

Said intervener, John E. Hornsby, shows to the court that this case was tried in the circuit court for the district of Kansas on the receivers' demurrer to this intervener's petition in Dec., 1892, at which time said court sustained said demurrer and rendered its decree dismissing this intervener's petition; whereupon, by appropriate proceedings, he brought said judgment or decree to this court for review, where it was argued by counsel for both parties and duly considered by this court; whereupon, in May, 1893, this court rendered its judgment reversing the said judgment or decree of the circuit court and holding that said petition did state a cause of action; that this case now before the court is the same one as the one just referred to as previously decided by this court; that the only question presented to this court or decided by its judgment so rendered as aforesaid was whether or not ch. 93 of the Sessions Laws of Kansas for 1874, being sec. 1251 of the General Statutes of Kansas of 1889, applied to and embraced receivers, making the said receivers herein liable to this intervener to the same extent as the railroad company would have been had it been operating the railroad; that said question was resolved by the judgment of this court in favor of this intervener and against said receivers; that said judgment remains in full force and effect, unreversed, and unappealed from; that the above-named receiver, as the successor of said Eddy and Cross, receivers, is now seeking to raise said question

again and to secure another decision thereon; that said question is sought to be raised by the 4th, 5th, 13th, 34th, and 35th assignments of error, as shown by the record in this case.

Wherefore, in consideration of the premises, this intervener pleads said question as *res adjudiacta*, and that the plaintiff in error herein is estopped from again setting up said objection to this intervener's right of recovery, and he moves the court to strike from the record said 4th, 5th, 13th, 34th, and 35th assignments of error and all other parts of the record on which they are based, and that in considering and passing on the judgment and proceedings of the circuit court sought to be reviewed herein you exclude from your consideration all matters pertaining to said question decided as aforesaid.

In support of this motion reference is hereby made to the record of this case on the former trial in this court as well as to the record brought here in the present appeal.

NELSON CASE,
W. B. GLASSE,
W. D. ATKINSON,
Attorneys for Intervener.

Notice.

The above-named receiver and his attorneys of record will take notice that at the opening of court on January 16, 1895, or so soon thereafter as counsel can be heard, the above-named intervener will present the foregoing motion to said court, at its sitting in the city of St. Louis, Missouri, and ask its decision and order thereon.

NELSON CASE,
W. B. GLASSE,
W. D. ATKINSON,
Attorneys for Intervener.

Service by copy of the above motion and notice acknowledged this 31st day of December, 1894.

T. N. SEDGWICK,
Attorney for Receiver.

(Record, page 168.)

Stipulation.

It is agreed between the above-named parties, receiver and intervener, appellant and appellee, plaintiff in error and defendant in error, that the foregoing motion shall be considered as made in both cases, numbered respectively 488 and 489, brought to this court by said receivers, and shall apply to whichever of said cases said court shall hold is properly before them for trial and to both of them if both shall be held for consideration.

T. N. SEDGWICK,
Attorney for Receiver.
NELSON CASE,
W. B. GLASSE,
W. D. ATKINSON,
Attorneys for Intervener.

Endorsed: "No. 488: Henry C. Rouse, receiver, &c., substituted for Eddy & Cross, deceased, plaintiff in error, *vs.* John E. Hornsby, intervener. No. 489: Henry C. Rouse, receiver, &c., substituted for Eddy & Cross, deceased, appellant, *vs.* John E. Hornsby, intervener. Motion, etc., defendant in error and appellee to strike certain assignments of error from record, etc. Filed Jan. 4, 1895. John D. Jordan, clerk."

And on the seventeenth day of January, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a motion to certify question to the Supreme Court in the words and figures following, to wit:

(Record, page 170.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

HENRY C. ROUSE, Receiver *de bonis non*, Appellant and Plaintiff in Error,
vs.
JOHN E. HORNSBY, Intervener, Appellee and Defendant in Error.

Motion to Certify Question to the Supreme Court.

Comes now the plaintiff in error in the above cause and moves the court to certify to the Supreme Court the question in this case:

Are the receivers of a railroad company appointed by a circuit court of the United States for the district of Kansas and by virtue of such appointment in the control and operation of the property of a railroad company having a line through the State of Kansas liable in damages to a servant who is injured while in performance of his duty as such servant, in said State of Kansas, by or through the negligence of a coservant, where the only change in the common-law rule of liability to servants for such injuries is the following statute of the State of Kansas, passed by the legislature in 1874, to wit?

Chapter 93, sec. 1, Laws of 1874.

Section 1. "Every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, to any person sustaining such damage."

The reasons for this motion are that the question presented is a very important one, as at least two of the largest systems of railroad in the West are now in the hands of receivers appointed by the circuit court of the United States, and both systems have lines of road into and through the State of Kansas, and there are also other lines of road not so extensive but in the same State and now controlled and operated by receivers appointed by the Federal court, and the receivers of all these corporations deny any liability under

the above statute and insist that they are only liable to a servant for injuries where the negligence causing the injury was that of a master or vice-principal, and claims are constantly arising making it important, in fact necessary, that the question be finally determined as soon as possible, and for a further reason that this court has already passed upon the question, answering it affirmatively, and the question is again presented in this case, and while not controlling is a very important question therein, and the other questions presented are of no consequence or importance outside of this case.

And still another reason is that this case is not one where the decision of this court is final, but an appeal may be taken to the Supreme Court of the United States under sec. 6 of the act of March 3d, 1891, and the question will not be regarded as finally settled until passed upon by that court, and the defendant in error has filed in this court a motion to strike from the record of this cause all reference to this question in this cause upon the ground of *res adjudicata*, notwithstanding the fact that the former decision of the question by this court was not a final judgment.

T. N. SEDGWICK,
Attorney for Appellant and Plaintiff in Error.

STATE OF MISSOURI, } ss:
City of St. Louis, }

T. N. Sedgwick, of lawful age, being first duly sworn, upon oath deposes and says that he is the attorney for the appellant and plaintiff in error; that he has read the above motion and statement of facts thereto appended as reasons for the same, and that they are true, as he believes.

(Signed) T. N. SEDGWICK.

Subscribed and sworn to before me this 17th day of January, 1895.

(Signed) GEO. F. HAID,
Commissioner United States Circuit Court,
[SEAL.] *Eastern Judicial District of Missouri.*

Endorsed: Filed Jan'y 17, 1895. John D. Jordan, clerk.

(Record, page 174.)

And on the eighteenth day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

HENRY C. ROUSE, Receiver *de bonis non*, etc., Substituted for George A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas & Texas Railway Company, Plaintiff in Error, *vs.* JOHN E. HORNSBY, Intervener, Defendant in Error.	# 488. In Error to the Circuit Court of the United States for the District of Kansas.

FRIDAY, *January* 18*th*, 1895.

This cause came on to be heard on the motion filed by the plaintiff in error to certify question to the Supreme Court of the United States and on the motion filed by the defendant in error to strike certain assignments of error from the record; and, the court having considered said motions and being fully advised in the premises, it is ordered that said motions be, and they each are hereby, denied.

Thereupon the cause was argued on the merits by Mr. T. N. Sedgwick in behalf of the plaintiff in error, and at the conclusion thereof, the court declining to hear oral argument in behalf of the defendant in error, the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the fourth day of March, A. D. 1895, an opinion of said circuit court of appeals was filed in said cause in the following words, to wit:

(Record, page 175.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1894.

HENRY C. ROUSE, Receiver *de bonis non* of the Missouri, Kansas and Texas Railway Company, Substituted for George A. Eddy and Harrison C. Cross, Deceased, Plaintiff in Error, *vs.* JOHN E. HORNSBY, Intervener, Defendant in Error.	No. 488. In Error to the Circuit Court of the United States for the District of Kansas.

December Term, A. D. 1894.

HENRY C. ROUSE, Receiver *de bonis non* of the Missouri, Kansas and Texas Railroad Company, Substituted for George A. Eddy and Harrison C. Cross, Deceased, Appellant, *vs.* JOHN E. HORNSBY, Intervener, Appellee.	No. 489. Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. T. N. Sedgwick for plaintiff in error.

Mr. Nelson Case and Mr. W. B. Glasse (Mr. W. D. Atkinson was with them on the brief) for intervener.

Before Caldwell, Sanborn, and Thayer, circuit judges.

CALDWELL, *J.*, delivered the opinion of the court:

In the foreclosure suit of the Mercantile Trust Company against the Missouri, Kansas and Texas Railway Company, commenced in the United States circuit court for the district of Kansas, George A. Eddy and Harrison C. Cross were appointed receivers of the road and property of the defendant company and invested with the usual powers of receivers of railroads. John E. Hornsby, the intervener and defendant in error, was in the employ of the receivers as train baggageman, and on the third day of June, 1891, while on a train in the discharge of his duties received personal injuries in a head-on collision between the passenger train on which he was working and a freight train. The collision resulted from the negligence of the conductor and engineer in charge of the freight train. The defendant in error filed his petition of intervention in the foreclosure suit in which the receivers were appointed to recover damages from the receivers for the personal injuries he received in the collision. A demurrer to this petition was sustained by the circuit court and the petition dismissed, whereupon the intervener brought the case by writ of error into this court, where the judgment of the circuit court was reversed and the cause remanded with directions to overrule the demurrer to the intervening petition and proceed with the trial and decision thereof. The contention of the defendants

in error in that case, plaintiffs in error in this, was that paragraph 1251, 1 Gen. Stat. Kansas, 1889, did not apply to railroads operated by receivers, and that, as the intervener's injuries resulted from the negligence of his fellow-servants, the receivers were not liable therefor; but this court held the statute cited applied as well to receivers operating a railroad as to a railroad company, and that in Kansas under this statute the fact that the injury resulted from the negligence of a fellow-servant was no longer available as a defense, either to a receiver operating a railroad or to a railroad company. Hornsby *v.* Eddy *et al.*, 56 Fed. Rep., 461; 5 C. C. A., 560; 12 U. S. App., 404.

After the cause was remanded to the circuit court the plaintiffs in error moved that it be referred to a "master, with instructions to find and report on both the law and the facts," and the defendant in error moved that a jury be impanelled to try the issue. The court denied the motion of the plaintiffs in error, and ordered a jury to be called to try the case. There was a verdict and judgment for the intervener, and the defendants sued out this writ of error. An elaborate brief is filed by the plaintiffs in error in support of the contention that the section of the Kansas statute referred to does not apply to receivers operating a railroad, and that as to them the fellow-servant rule of the common law still obtains. This question was carefully considered when this cause was first here. We are all entirely satisfied with the result then reached.

While the intervening petition was filed in a chancery suit, it had no relation to any equitable issue in that case, and presented only a cause of action at law which the court very properly impaneled a jury to try. For all practical purposes it was an action at law against the receivers, and the circuit court did right in treating it as such. The plaintiffs in error preferred several requests for instructions, which were refused, and excepted to the instructions given. The instructions which the plaintiffs in error asked the court to give, so far as they are good law, are embodied in the charge of the court. That portion of the charge of the court excepted to relates to the measure of damages. The charge on this subject is in the usual and customary language. The elements that go to make up the damages in such cases are as well known to the jury as to the judge. It is a very plain, practical matter, and it is difficult to perceive what more the court can profitably tell the jury than that in estimating the damages they will take into consideration the age of the plaintiff, his physical condition before and after the injury, the wages or income he was capable of earning before the injury, and the extent and probable duration of the loss of his earning powers resulting from the injury, and that they may include in their assessment of damages a fair and reasonable compensation for the physical pain suffered by the plaintiff as the result of his injury. This was in substance what the court told the jury. These are the very lines the jury, as practical, sensible men, would pursue in estimating the damages, without any instructions from the court. They are based on common sense and are matters of

common knowledge. It is neither desirable nor safe to indulge in too much detail and refinement in charging a jury as to what they shall and shall not take into consideration in assessing the damages in this class of cases. Too much detail and refinement serve to confuse and mislead the jury rather than to enlighten them. The law does not require it and the jury does not need it. St. L., I. M. & S. R'y Co. *v.* Needham, 52 Fed. Rep., 371; 3 C. C. A., 129; 10 U. S. App., 339.

Some exceptions are taken to the instructions given and to the refusal of the court to give others on the question of the defendant's negligence. On this question the charge of the court was more favorable to the defendants than they had any right to ask. The court should have told the jury that a collision between two of the defendant's trains, operated by their agents, while going at full speed in opposite directions on a single track was a sufficient evidence of negligence on the part of some of the defendant's servants. The time will probably never come when a collision resulting from an attempt to have two trains going at full speed in opposite directions pass each other on the same track will not be held to be negligence, in law.

The court is asked to reverse the case on the ground that the damages assessed by the jury, $15,000.00, were excessive. The jury is the tribunal appointed by law to assess the damages in such cases and their finding upon that question is conclusive in this court. The judgment of the circuit court is affirmed.

This cause was brought here by both writ of error and on appeal, the defendants being in doubt whether this court would treat the intervening petition setting up a legal demand accruing against the receivers as an action at law or a suit in equity. As the intervening petition set up a clause of action exclusively cognizable at law and was tried by jury as such, a writ of error was the appropriate mode of bringing the record into this court.

The appeal in this case will therefore be dismissed.

Filed March 4, 1895.

(Record, page 178.)

And on the fourth day of March, A. D. 1895, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

HENRY C. ROUSE, Receiver *de bonis non*, Substituted for George A. Eddy and Harrison C. Cross, Deceased, Receivers of the Missouri, Kansas and Texas Railway Company, Plaintiff in Error,
vs.
JOHN E. HORNSBY, Intervener, Defendant in Error. } #488.

In error to the circuit court of the United States for the district of Kansas.

MONDAY, *March 4th*, 1895.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that John E. Hornsby, intervener, recover against Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas and Texas Railway Company, the sum of twenty dollars for his costs herein and have execution therefor, March 4, 1895.

(Record, page 178.)

And on the second day of July, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a petition for allowance of writ of error in the words and figures following, to wit:

To the Honorable David J. Brewer, associate justice of the Supreme Court of the United States:

Comes now Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, by James Hagerman and T. N. Sedgwick, his attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in the suit between said Henry C. Rouse, as receiver *de bonis non*, as plaintiff in error, and said John E. Hornsby, intervener, as defendant in *re* error, in the United States circuit court of appeals for the eighth circuit, at the December term, 1894, thereof, and in which judgment was rendered against the said Henry C. Rouse as receiver *de bonis non* of the said Missouri, Kansas & Texas Railway Company, on the 4th day of March, A. D. 1895, for the sum of fifteen thousand dollars, and the said Henry C. Rouse, as receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, complains that a manifest error has intervened against him, the said Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, as fully appears from a transcript of the record and judgment in which case herewith submitted.

Wherefore he prays for the allowance of a writ of error and such

other process as may cause the same to be corrected by the Supreme Court of the United States aforesaid.

HENRY C. ROUSE,
Receiver de bonis non of the Missouri, Kansas & Texas Railway Company,
By JAMES HAGERMAN AND
T. N. SEDGWICK,
His Attorneys.

Endorsed: "No. 488. Henry C. Rouse, receiver, &c., plaintiff in error, *vs.* John E. Hornsby, int'v'r. Petition for allowance of writ of error. Filed Jul- 2, 1895. John D. Jordan, clerk."

(Record, page 180.)

And on the second day of July, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals an assignment of errors in the words and figures following, to wit:

UNITED STATES OF AMERICA:

HENRY C. ROUSE, Receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, Plaintiff in Error,
vs.
JOHN E. HORNSBY, Intervener, Defendant in Error.

Assignment of Errors.

Whereas, on the 4th day of March, 1895, at the regular December, 1894, term of the United States circuit court of appeals for the eighth judicial circuit, in a cause then and there pending on writ of error from the circuit court of the United States, district of Kansas, in which the said Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, was plaintiff in error and said John E. Hornsby, defendant in error, the judgment of the said circuit court for the district of Kansas was affirmed, to the manifest prejudice of the said Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, and the said Henry C. Rouse, as receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, avers there was error in said judgment and record in this, to wit:

1. The said circuit court of appeals erred in affirming the judgment of the said United States circuit court for the district of Kansas.

2. The said circuit court of appeals erred in not reversing the judgment of the said circuit court of the United States for the district of Kansas.

3. The said circuit court of appeals erred in its judgment and conclusions in holding that the plaintiff, as receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, was liable in all cases where the railroad company would have been liable had it been operating the road at the time of the injury complained of by

the said John E. Hornsby in his petition filed in said circuit court of the United States for the district of Kansas.

4. The said circuit court of appeals erred in holding that section 1251 of the General Statutes of Kansas of 1889 had any application whatever to receivers of railroads who might be operating the same under appointment and authority of a court of competent jurisdiction.

5. The said circuit court of appeals erred in extending by its judgment the liability created by said statute to receivers of railroad companies who might be operating the same.

6. The said circuit court of appeals erred in refusing to be governed in its interpretation and construction of said section 1251 of the General Statutes of Kansas of 1889 by the decision of the supreme court of Kansas in the case of Beeson *vs.* Busenbark, 44th Kansas, page 669, and in ignoring said decision.

7. The said circuit court of appeals erred in its construction of section 1251 of the General Statutes of Kansas of 1889 and of the decisions of the supreme court of said State thereunder.

8. The said circuit court of appeals erred in holding and deciding that the act of Congress of March 3rd, 1887, makes a receiver of a railroad appointed by a Federal court liable in all cases where the company whose property the said receiver controls and operates would have been liable had it been operating the road at the time of the injuries complained of.

9. The said circuit court of appeals erred in holding that the receivers of the Missouri, Kansas & Texas Railway Company were in any sense the agents of the company.

10. The said circuit court of appeals erred in holding and deciding that the term "railroad company" as used in section 1251 of the General Statutes of Kansas of 1889 embraced receivers of railroad companies.

11. The said circuit court of appeals erred in holding and deciding that said section 1251 of the General Statutes of Kansas of 1889 was a remedial statute to be liberally construed.

12. The said circuit court of appeals erred in holding and deciding that said section 1251 of the General Statutes of Kansas of 1889 was intended to give a cause of action to all servants who might be injured through the negligence of a coservant while engaged in the dangerous and hazardous business of operating railroads, regardless of whom or what the master in the control and operation of the road might be.

13. The said circuit court of appeals erred in holding and deciding that said section 1251 of the General Statutes of Kansas of 1889 applied to and made liable others than railroad companies who might be in charge of and operating railroads, and that it applied to the agents, servants, and employees of others than railroad companies who might be engaged in the dangerous and hazardous business of operating trains upon railroads.

14. The said circuit court of appeals erred in holding and deciding that the act of Congress of March 3rd, 1887, creates a liability against a Federal receiver where none existed under the State law.

15. The said circuit court of appeals erred in holding and deciding that the case of Beeson *vs.* Busenbark, 44th Kansas, page 669, and decided by the supreme court of Kansas, did not in effect construe and interpret section 1251 of the General Statutes of Kansas of 1889.

16. The said circuit court of appeals erred in not reversing said cause and remanding the same to the said circuit court of the district of Kansas for a new trial.

17. The said circuit court of appeals erred in not reducing the amount of the judgment to eight thousand dollars, as the same is excessive and exorbitant by fully seven thousand dollars.

18. The said circuit court of appeals erred in not reversing said judgment upon account of the erroneous construction given by the trial judge on the trial of said cause.

19. The said circuit court of appeals erred in not reversing said cause because of the error committed by the trial court in refusing to send the issues to a master instead of to a jury.

20. The said circuit court of appeals erred in holding and deciding that the act of Congress of March 3rd, 1887, had any bearing or influence upon the liability of the plaintiff in error under section 1251, or that his liability was any different under said action because of said act of Congress than what it would have been had said act never been passed.

21. The said circuit court of appeals erred in refusing to certify the question to the Supreme Court of the United States as to whether said plaintiff in error was liable to the defendant in error under section 1251 of the General Statutes of Kansas of 1889.

22. The said circuit court of appeals erred in not certifying to the Supreme Court of the United States upon the application of the plaintiff in error the question whether the plaintiff in error was liable to defendant in error under section 1251 of the General Statutes of Kansas of 1889.

Wherefore the said Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, prays that said judgment of said United States circuit court of appeals and said judgment of said United States circuit court for the district of Kansas be reversed, and that he be restored to all things which he has lost thereby.

JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

Endorsed: "No. 488. Henry C. Rouse, receiver, etc., plaintiff in error, *vs.* John E. Hornsby. Assignment of errors. Filed Jul- 2, 1895. John D. Jordan, clerk."

(Record, page 183.)

And on the twentieth day of July, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a bond on writ of error in the words and figures following, to wit:

In the Supreme Court of the United States.

HENRY C. ROUSE, Receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, Plaintiff in Error,
vs.
JOHN E. HORNSBY, Intervener, Defendant in Error.

Know all men by these presents that we, Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, as principal, and James Hagerman, of St. Louis, Mo., as a surety, are held and firmly bound unto the said John E. Hornsby, of Parsons, Labette county, Kansas, defendant in error in the above cause, in the sum of five hundred dollars, to be paid to said John E. Hornsby, intervener, his executors or administrators; for which payment, well and truly to be made, we bind ourselves and each of us, severally and jointly, and our heirs, executors, administrators, successors, and assigns, firmly by these presents upon the following conditions, to wit:

Whereas the above-named Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the United States circuit court of appeals in and for the eighth circuit, and which said judgment was rendered in said cause on March 4th, 1895, at the December, 1894, term of said court:

Now, therefore the conditions of this obligation are that if the above-named Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

It witness whereof we have hereunto subscribed our names this — day of ——, 1895.

H. C. ROUSE, *Receiver*,
By JAMES HAGERMAN,
His Attorney.
JAMES HAGERMAN.

THE UNITED STATES OF AMERICA:

E. B. Stevens, of lawful age, being duly sworn, deposes and says—That he is worth the sum of ten thousand (10,000) dollars over and above all just debts, liabilities, and legal exemptions; and further affiant saith not.

—— ——.

Subscribed and sworn to before me this — day of ——, 1895.

—— ——,
United States Commissioner.

I approve the above bond and the surety thereto.

(Signed) AMOS M. THAYER,
U. S. Cir. Judge.

(Signed) DAVID J. BREWER,
Associate Justice Sup. Ct.

July 16.

Endorsed: "No. 488. Henry C. Rouse, receiver, etc., plaintiff in error, *vs.* John E. Hornsby. Bond on writ of error. Filed Jul- 20, 1895. John D. Jordan, clerk."

And on the twentieth day of July, A. D. 1895, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

(Record, page 186.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas and Texas Railway Company, plaintiff in error, and John E. Hornsby, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this 31st day of July, A. D. 1895.

[Seal of the U. S. Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed: No. 488. Henry C. Rouse, receiver, &c., pl'ff in error, *vs.* John E. Hornsby. Original writ of error. Filed Jul- 20, 1895. John D. Jordan, clerk.

And on the 29th day of July, A. D. 1895, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with acknowledgment of service endorsed thereon, is hereto and herewith returned.

(Record, page 188.)

UNITED STATES OF AMERICA, *ss:*

To John E. Hornsby, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eight circuit, wherein Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas and Texas Railway Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

We hereby acknowledge service of the within citation this 25th day of July, A. D. 1895.

CASE & GLASSE AND
W. D. ATKINSON,
Att'ys for Def't in Error.

Endorsed: 488. Henry C. Rouse, receiver, etc., pl'ff in error, *vs.* John E. Hornsby. Citation. Filed Jul-29, 1895. John D. Jordan, clerk.

(Record, page 189.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing 188 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, plaintiff in error, *vs.* John E. Hornsby, intervener, defendant in error, # 488, December term, 1894, as the same remains upon the files and records of said United States circuit court of appeals.

I further certify that on the sixth day of May, A. D. 1895, a mandate in accordance with the opinion and judgment of said circuit court of appeals was issued out of the clerk's office of said court, directed to the circuit court of the United States for the district of Kansas. I do further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

Seal of U. S. Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 31st day of July, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

161 U.S. 588

JAMES H. McKEN

161-588

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY C. ROUSE, Receiver,
PETITIONER,

vs.

JOHN E. HORNSBY, Intervener.

No. 997.
October, 1895, Term.

Suggestions in opposition to granting the Writ of Certiorari

NELSON CASE, Attorney for Intervener.

Endorsed: 488. Henry C. Rouse, receiver, etc., pl'ff in error, *vs.* John E. Hornsby. Citation. Filed Jul-29, 1895. John D. Jordan, clerk.

(Record, page 189.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing 188 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Henry C. Rouse, receiver *de bonis non* of the Missouri, Kansas & Texas Railway Company, plaintiff in error, *vs.* John E. Hornsby, intervener, defendant in error, # 488, December term, 1894, as the same remains upon the files and records of said United States circuit court of appeals.

I further certify that on the sixth day of May, A. D. 1895, a mandate in accordance with the opinion and judgment of said circuit court of appeals was issued out of the clerk's office of said court, directed to the circuit court of the United States for the district of Kansas. I do further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

Seal of U. S. Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 31st day of July, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

161 U.S. 588

Office Supreme Court U.S.
FILED.
MAY 11 1896
JAMES H. McKENNEY,
CLERK.

161-588

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY C. ROUSE, Receiver,
PETITIONER,

vs.

JOHN E. HORNSBY, Intervener.

No. 997.
October, 1895, Term.

Suggestions in opposition to granting the Writ of Certiorari

NELSON CASE, Attorney for Intervener.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY C. ROUSE, Receiver,
PETITIONER,

vs.

JOHN E. HORNSBY, Intervener.

No. 997.
October, 1895, Term.

Suggestions in opposition to granting the Writ of Certiorari

The time that has been at my command since receiving notice of the application for the writ prayed for herein has been so short that I can only attempt to outline an argument why the writ should not be granted. In opposi-

tion to the petitioner's application I submit the following suggestions:

I.

It might be noted in the first place that the petitioner is the mere creature of the court whose judgment he is now seeking to have reviewed. If he represents the court, then it may be said that the court is certainly satisfied with the final judgment it rendered. If he represents the creditors of the corporation it ought to be sufficient to say that it was only by the grace or favor of the court, and not as a matter of right, that he was appointed. If he represents the corporation, then no one questions that the corporation should pay the intervener's claim. In any event the parties represented by the petitioner have had all that the law gives them, and petitioner should not be so earnest in pressing his claim for *favors*. It looks very much as though some one other than this nominal party were insisting on prolonging this litigation.

II.

It has already been decided by this court that the petitioner cannot bring this case to this court as a matter of *right*, and the question is, will this court, as a matter of *favor*, allow the petitioner to still further hinder the intervener in recovering a claim that has been adjudged his due. When one party comes in court voluntarily and brings another in by proper process and each invokes the jurisdiction of the court to determine his legal rights, and under such jurisdiction and proceedings their matters of difference pass into final judgment, the financial condition and comparative standing of the two parties is a matter of entire indifference and as a rule ought not to be mentioned

to or considered by the court. But I submit that in an application of this kind such conditions and circumstances are proper subjects for consideration. These parties have had their day in court: each has all the *rights* given to him by the law. On the real merits of the case two decisions have been had in the trial court and two in the court of appeals; in addition to that, the decision of this court has been had that the judgment of the court of appeals was final. Therefore, the matters at issue have not gone to final judgment without careful consideration of the rights of the parties by tribunals deemed by congress sufficient to finally determine such questions. The party made defendant in this case had no right to complain of this protracted litigation, for the course pursued by the receiver was such as the law authorized him to take: each stood upon his *rights*. Now a stage has been reached in the proceedings when things have changed—one party is no longer willing to stand on his rights; he comes and asks this court for something as a matter of grace and favor. One of the reasons I offer why we object to this favor being shown is the unequal condition of the parties. The receiver represents a great corporation with untold millions at his back. That corporation is not now in a bankrupt condition but has been restored to its regular working operation under its charter, and the receiver is a mere nominal representative to close up old business. I am not going outside the record in case No. 706, only a part of which have been printed in this court, which is, by order of this court, to be used on the hearing of the application herein, when I say that, outside of his home, the intervener Hornsby has no means whatever, and was entirely dependent on his personal services for the maintenance of

himself and family, consisting of a wife and four children; that in June, 1891, he was totally disabled in a railroad wreck while in the employ of plaintiff's predecessors, receivers of M. K. & T. R'y Co.; that ever since that date he has lain prostrate on his back without the ability to help himself one particle. I submit that this is not the kind of a case where a court should use its discretionary powers to prolong litigation that has now been protracted for five years. I therefore most respectfully, but earnestly, protest against the granting of the writ prayed for because it would, as it seems to me, be a great wrong to an unfortunate litigant who is unable to stand either the mental strain or the expense incident to such a result.

III.

Were the standing and relationship of the parties, and other features of the case, such as to commend the cause to the court's favor, then the only reason assigned in the petition why the writ should issue which, as it seems to me, is worthy of serious consideration is plaintiff's claim that the Kansas supreme court had, prior to the catastrophe in in which the intervener sustained his injuries, construed the statute under which his recovery was had contrary to the construction placed upon it by the court of appeals. Has this claim any substantial basis? Plaintiff's whole contention rests on the assumption that such is the effect of the decision in the case of Beeson vs. Busenbark, 44 Ks. 669. At each hearing of this case, both in the circuit court and the court of appeals, counsel for the receivers pressed this point and made the same claim they are now making in this application. Such claim was carefully considered by the court of appeals and disposed of in a satisfactory manner, as I think, by Judge Thayer in giving

the opinion of the court in Hornsby vs. Eddy, which opinion is set out in the application for the writ herein, and to that I refer the court without quoting the argument here. Prior to the decision of the case of Beeson vs. Busenbark, our supreme court had passed upon this statute in the case of Union Trust Co. vs. Thompson, and had practically given it the construction for which we are now contending. Chief Justice Horton wrote the opinion in both cases and there is no suggestion in the case of Beeson vs. Busenbark that they are overruling or criticising the decision they had already made in Union Trust Company vs. Thompson. So far as I know it had never been suggested that there was any conflict in these two decisions. Nor is it correct to say, as counsel do, that the recent decision of Rouse vs. Harry, set out in plaintiff's application herein, overrules the prior case of Beeson vs. Busenbark. Justice Allen in giving the opinion of the court in Rouse vs. Harry refers to both the cases of Union Trust Company vs. Thompson and Beeson vs. Busenback and says that there is no disposition to overrule either of those decisions and construes them as in entire harmony with the construction of the statute now given in Rouse vs. Harry. It will be thus noted that not only the court of appeals but also the Kansas supreme court hold that all three of the decisions of the latter in which they have construed this statute are harmonious and are in accord with the construction which has thus far governed in the determination of this case, and such is the opinion of the profession generally. Such construction would be binding on this court were it considering this case on its merits.

The decisions of the court of appeals for the Fifth circuit are of no force here for the reason that both of

them are based entirely on the prior decision of the Texas supreme court which the court of appeals said was binding on it. The latter court did not pretend to give its assent to such construction. That construction is the law in Texas, but the construction given the statute by the Kansas supreme court is the law here.

IV.

Counsel claim that they want the statute construed by this court because it it a matter of great public interest and there now being conflicting constructions they should be harmonized. In reply to this I remark that this question is now before this court in a case which the petitioner herein has brought here as a matter of right, and, so far as it can be settled by this court at all, the uniformity of consruution can be settled in that case. It is not necessary for this court to exercise its discretionary powers and bring this intervener into court again simply to gratify some one's curiosity as to what view this court will take of that statute, or to serve some public good by establishing a uniformity of practice in the various districts, for those matters can all be accomplished, if accomplished at all, in a case now pending and of which this court has jurisdiction as a matter of right.

I think I have suggested sufficient reasons why this writ should not issue. I submit that in view of the facts disclosed by the record, and of the legal principles that have been applied in the determination of the case, the hardship of farther litigation should not be imposed on this intervener by the exercise of its discretionary power on the part of the court.

NELSON CASE,
Attorney for Intervener.

JAN 13 1896
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY C. ROUSE, Receiver,
PLAINTIFF IN ERROR.

AGAINST

No. 706 / 15,396

JOHN E. HORNSBY, Intervener,
DEFENDANT IN ERROR.

Brief of Counsel for Defendant in Error an Motion to Dismiss or Affirm.

them are based entirely on the prior decision of the Texas supreme court which the court of appeals said was binding on it. The latter court did not pretend to give its assent to such construction. That construction is the law in Texas, but the construction given the statute by the Kansas supreme court is the law here.

IV.

Counsel claim that they want the statute construed by this court because it it a matter of great public interest and there now being conflicting constructions they should be harmonized. In reply to this I remark that this question is now before this court in a case which the petitioner herein has brought here as a matter of right, and, so far as it can be settled by this court at all, the uniformity of consruution can be settled in that case. It is not necessary for this court to exercise its discretionary powers and bring this intervener into court again simply to gratify some one's curiosity as to what view this court will take of that statute, or to serve some public good by establishing a uniformity of practice in the various districts, for those matters can all be accomplished, if accomplished at all, in a case now pending and of which this court has jurisdiction as a matter of right.

I think I have suggested sufficient reasons why this writ should not issue. I submit that in view of the facts disclosed by the record, and of the legal principles that have been applied in the determination of the case, the hardship of farther litigation should not be imposed on this intervener by the exercise of its discretionary power on the part of the court.

NELSON CASE,
Attorney for Intervener.

Office Supreme Court U. S.
FILED.
JAN 13 1896
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY C. ROUSE, Receiver,
PLAINTIFF IN ERROR.

AGAINST

No. 706/15396

JOHN E. HORNSBY, Intervener,
DEFENDANT IN ERROR.

Brief of Counsel for Defendant in Error on Motion to Dismiss or Affirm.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY C. ROUSE, Receiver,
PLAINTIFF IN ERROR.

AGAINST

JOHN E. HORNSBY, Intervener,
DEFENDANT IN ERROR.

Motion to Dismiss or Affirm.

Said defendant in error moves the court to dismiss the petition in error in this case because this court has no jurisdiction to hear and determine the case on the record; and as reason for such want of jurisdiction, defendant in error shows the court that this case was not commenced as an original action, but arose as an ancillary proceeding in another case instituted in the United States Circuit Court for the District of Kansas by the Mercantile Trust Company of New York, as plaintiff, against the Missouri, Kansas and Texas Railway Company, as defendant.

That said Circuit court had jurisdiction of said case only by reason of the fact of said parties being citizens of different states, said plaintiff being a corporation, citizen of the state of New York, and said defendant a corporation, citizen of the state of Kansas. That in said case, at the

instance of said plaintiff, said defendant corporation was placed in the hands of receivers appointed by said court.

That this defendant in error became an employe of said receivers, and while in their employ sustained injuries, to recover for which, by permission of said court, he intervened in said case, and filed his petition as plaintiff, against said receivers as defendants.

That the jurisdiction of said court attached to said intervener's case only by virtue of the appointment of said receivers, and their being officers and under the control of said court.

That plaintiff in error in this case is the duly appointed successor of said receivers originally appointed by said court as aforesaid, and is now acting under the direction of said court.

That in said Circuit Court, said intervener duly recovered judgment against said receivers, to reverse which plaintiff in error sued out and prosecuted a writ of error to the Circuit Court of Appeals for the Eighth circuit, where said judgment was affirmed.

This defendant alleges that by virtue of the provisions of chapter 517 of 26th United States Statutes at Large, the judgment of said Circuit Court of Appeals is final, and no error lies therefrom to this court.

In the event that this court shall overrule the foregoing part of this motion and shall hold that it has jurisdiction to hear and determine this case on the merits, then said defendant in error moves the court to affirm the judgment of the Circuit Court of Appeals, because it is manifest that this writ of error is sued out for delay only; and also, that if the court has jurisdiction the question on which it depends is so frivolous as not to need farther argument.

Defendant in error shows the court that the only substantial question in the case is the construction of a statute of the State of Kansas, making railroad companies liable for damages to employes caused by the negligence of fellow servants. That said statute has been fully and definitely construed by the Supreme Court of Kansas, being the court of last resort in said state, which construction is, that said statute applies as well to receivers while operating a railroad as to the company itself; and is fully in harmony with the construction placed thereon by said Circuit Court of Appeals; and under the established rules of practice, this court is bound to follow the construction given said statute by the court of last resort in said state, and could do nothing else than affirm the decision of the Circuit Court of Appeals.

Said defendant in error farther shows the court that plaintiff in error ought not to be allowed to prosecute this writ of error for the reason that the question here sought to be reviewed is *res adjudicata:* that to intervener's petition said receivers interposed a demurrer on the sole ground that said statute did not apply to receivers and was not a sufficient foundation in law to support intervener's claim, which contention was upheld by said Circuit Court and said demurrer sustained; whereupon, intervener electing to stand on his petition without amendment, said court rendered its judgment dismissing his petition and awarding costs agınst him : That to reverse said final judgment, said intervener sued out a writ of error to the Circuit Court of Appeals for the Eighth circuit, where said judgment of the Circuit Court was reversed : That without prosecuting a writ of error to this court, said receivers accepted said judgment of the Circuit Court of Appeals, whereupon said

case was remanded to the Circuit Court for trial: That upon such trial judgment was rendered as aforesaid in favor of this defendant in error: That on said judgment a writ of error was sued out by said receivers to the Circuit Court of Appeals, as aforesaid, in which court the judgment of the Circuit Court was affirmed: That if said receivers had desired the judgment of this court, a writ of error should have been taken from the first judgment of said Circuit Court of Appeals.

NELSON CASE,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY C. ROUSE, Receiver,
PLAINTIFF IN ERROR.

AGAINST

No. 706/15006

JOHN E. HORNSBY, Intervener,
DEFENDANT IN ERROR.

Brief of Counsel for Defendant in Error on Motion to Dismiss or Affirm.

Statement of Facts.

1. The Mercantile Trust Company of New York commenced an action in the Circuit Court for the District of Kansas against the Missouri, Kansas and Texas Railway Company and others to foreclose a mortgage on the latter's property, and to obtain other relief. At the instance of said plaintiff receivers were appointed, and all of the property of the railway company, defendant, was placed in their hands.

2. The defendant in error in this case, John E.

Hornsby, was employed by said receivers as a baggageman in the operation of one of their trains. - While so employed Hornsby received injuries in a wreck caused by the collision of two of said receivers' trains.

3. By permission of said Circuit Court, during the pendency of said foreclosure proceeding, said Hornsby intervened in said suit and presented his petition to said court asking to recover damages from said receivers on account of his injuries so sustained, by virtue of the following statute of the state of Kansas:

"Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes to any person sustaining such damage."

Ch. 93, session laws 1874, paragraph 1251 gen. st. 1889.

4. To such petition of said Hornsby said receivers demurred on the ground that it did not state facts sufficient to constitute a cause of action. Said court sustained said demurrer, and, the intervener electing to stand on his petition, on December 3, 1892, judgment was rendered dismissing his claim.

(See opinion of Caldwell, J., p. 48 of printed record.)

5. To reverse such judgment said intervener prosecuted a writ of error to the Circuit Court of Appeals for the eighth circuit where, on May 29, 1893, the judgment of the Circuit Court was reversed and the case was remanded for said court to ascertain the amount which intervener should recover.

6. Thereafter, upon trial duly had in said Circuit Court, on February 14, 1894, the judgment of said court was rendered in favor of said intervener and against said receivers for the sum of $15,000 with interest and costs.

7. Thereupon said receivers sued out a writ of error

on such judgment to the said Circuit Court of Appeals where, on March 4, 1895, the judgment of the Circuit Court was affirmed.

8. To reverse the judgment of the said Circuit Court of Appeals said receiver seeks, by writ of error, to bring the same to this court.

9. The intervener has moved to dismiss or affirm under Rule 6 of this court.

Points for Argument.

In support of my motion I contend—

1. That there is nothing in the record showing that this court has jurisdiction;

2. That this court has no jurisdiction;

3. That the only substantial question in the case, the liability of receivers under the statute, is *res adjudicata*, having been fully determined in the first judgment of the Court of Appeals;

4. That if this court had jurisdiction the judgment of the Court of Appeals should be affirmed because the only question in the case, as raised by the assignments of error, is the construction of a Kansas statute, and such statute has been fully construed by the Supreme Court of Kansas, leaving nothing for this court but to approve such construction.

The Argument.

I.

It is the established rule in this court that jurisdiction must affirmatively appear.

"The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appelate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. In every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

M., C. & L. M. Ry. Co. vs. Swan, 111 U. S. 379, (bk. 28, p 463)

"If the judgment of the Circuit Court of Appeals for the eighth circuit was final, under the section in question, then the writ of error must be dismissed; and in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different states."

Col. Cent. Con. Mg. Co. vs. Turck, 150 U. S. 138, 14 Sup. Ct. R. 36

In the light of this rule I submit that the receiver has no standing in this court and his writ of error must be dismissed. There is nothing in this record to show that in the main case the jurisdiction of the Circuit Court attached for any other reason than because of divers citizenship of parties.

II.

I submit that this court has no jurisdiction to hear and determine this case. This was an ancillary proceeding in an original case brought by The Mercantile Trust Company, a citizen of New York, against the Missouri, Kansas and Texas Railway Company, a citizen of Kansas, to foreclose a mortgage on the property of the latter, in which case, as a part of the remedy asked and obtained, receivers were appointed. All that gave the Circuit Court jurisdiction in that case was the fact of the divers citizenship of the parties. Had an appeal been prosecuted

from the Circuit Court to the Court of Appeals the judgment of the latter would have been final—expressly made so by the act creating that court.

Had the case at bar been an original one the Federal Court would have had no jurisdiction, as all of the parties—the intervener, the railroad company, the receivers—are citizens of Kansas. But it was not an original case. Claimant was allowed to intervene in the case above referred to and to prosecute his claim against said receivers: and was required to do so or be without remedy. The Federal Court having jurisdiction of the original case takes a like jurisdiction of all ancillary proceedings connected therewith.

"The technical question of jurisdiction is solved by the ruling that in all ancillary or auxiliary proceedings for the enforcement of judgments rendered, and in proceedings for the protection of the rights of third parties, the jurisdiction is supported by that of the original action or suit."

Lamb vs. Ewing, 54 Fed. 273, 12 U. S. A. 11, 4 C. C. A. 320

This rule has been repeatedly announced and sanctioned in this court.

Krippendorf vs. Hyde, 110 U. S. 276 (bk. 28 p. 145)
Gumbel vs. Pitkin, 124 U. S. 131 (bk. 31 p. 374)
Fuel Co. vs. Brock, 130 U. S. 216 (11 Sup. Ct. R. 523)

It necessarily follows that the jurisdiction in this case, being dependent upon that in the original case, can be no broader than that. In that case, jurisdiction attaching only by virtue of diverse citizenship, terminated in the Court of Appeals; a like result must follow in this which is but ancillary to the other. And such has been the decision of this court. The case of Rouse, receiver, vs. Letcher, intervener, 156 U. S. 47, 15 Sup. Ct. R. 266, is parallel with the case at bar, and in that case it was held that the

jurisdiction in the ancillary proceeding could extend no farther than it would in the original case, and therefore the appeal was dismissed.

III.

If the question of the receivers' liability were to be brought to this court for adjudication, it should have been done from the first decision of the Court of Appeals, and not from the second. It is claimed for the Receiver that he could not have appealed from that judgment because it was not final. This cannot be correct. The judgment of the Court of Appeals at that time was that

"The judgment of the Circuit Court is therefore reversed, and the cause is remanded with directions to overrule the demurrer to the intervening petition, and to proceed with the trial and decision thereof in a manner not inconsistent with this opinion."

Hornsby vs. Eddy, 56 Fed. 461, 5 C. C. A. 562, 12 U. S. A. 404

This leaves no discretion in the trial court as to what is to be done. It is true it is to proceed with the trial of the case for the purpose of ascertaining how much the intervener should recover, but his right to recover was there finally adjudicated and was not sent back to be again passed on by the Circuit Court. There is no question that the judgment of the Circuit Court sustaining the receivers' demurrer to the intervener's petition and dismissing his case was a final judgment. Of course he might have asked, and probably obtained leave, to amend; however, he did not choose to do this but elected to stand on his petition, therefore that judgment was final. Had it been *affirmed* in the Court of Appeals there is no question but that the judgment of that court would have been a *final judgment*, and the intervener would have been at the end of the law, unless he could have prosecuted his appeal to this court.

Now, can it, with reason, be claimed that a different result follows when the judgment of the Court of Appeals is in favor of the intervener from what it would be had it been against him—is it a *final* judgment when it is against him, and *not* final when it is in his favor? I maintain that such is not the law—that the rule is that when the Court of Appeals renders its decision, either affirming or reversing the judgment of the Circuit Court, such judgment unless appealed from, is final and as a rule of law is conclusive on the parties themselves and on all courts in any farther litigation respecting the subject matter of such case. This places both parties on the same footing, while the contrary rule would give one party a right to appeal to this court if the judgment of the Court of Appeals was one way, but would not give the other party such right if the judgment was the other way. The rule for which I contend is the one held by the supreme court of Colorado. In that state the Court of Appeals sustains practically the same relation to its system of jurisprudence and to its supreme court, as in the Federal system the Circuit Court of Appeals does to this court. Of course the provisions respecting the two are not identical, but sufficiently so to make the decision of that court applicable as authority here. In a case where the Court of Appeals had *reversed* the judgment of the District Court an appeal was taken to the Supreme Court, when a motion was made to dismiss, and in passing on the motion the Supreme Court, after stating the case and quoting the provisions of the statute, say:

"The contention is that the affirmative declaration of the right 'to review every final judgment of the Court of Appeals' in cases which might have been taken to this court in the first instance is equivalent to a denial of the right in all other cases. We concede this, but we cannot accept the construction placed by counsel upon the phrase, 'every final

judgment of the Court of Appeals.' We think the words 'final judgment' are used for the purpose of distinguishing between the ultimate judgment of that court in a given case and a judgment that is merely interlocutory, and that the right to review remains in this court in all cases that might have been brought here in the first instance, irrespective of whether the judgment of the Court of Appeals is one of affirmance or reversal. This construction is in accordance with the practice that has prevailed without question up to the present time."

Col. Sp. L. S. Co. vs. Godding —Col.—, 36 Pac. 884.

Now, if the court could ever have entertained jurisdiction in this case it could have done so as well upon error from the first judgment of the Court of Appeals as from the last judgment of that court. The receiver having accepted, without question, the first judgment of the Court of Appeals as a correct statement of the law, he cannot thereafter question its correctness; the liability of the receivers as determined in such judgment and announced in such decision, thereby became the unalterable rule of law for this case, binding alike upon this court and all inferior courts where the attempt may be made to raise such question.

The rule is thus stated by the Supreme Court of Colorado in the recent case of Wilson vs. Bates,—Col.—40 Pac. 351 :

"Questions fully considered and settled in an opinion rendered in a former appeal in the same suit are not open for further review."

In the case of Supervisors vs. Kennicott, 4 Otto (94 U. S.) 498 (bk. 24 p. 260) this court, through Waite, C. J., announced the rules as follows :

"It is settled in this court that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate of this court."

It is true that these decisions have reference to former

decisions of the same case in the same court. That rule is of course applicable in the Court of Appeals. Therefore in this case the receiver could not properly raise in the second appeal, nor could the court properly pass on questions by it fully considered and decided in the first appeal. If, then, the receivers' liability, which had been fully decided in the first appeal, was not properly up for decision in the second appeal how could it get into this court? Nothing comes here for decision except what was properly before the Court of Appeals for decision. The first decision of the Court of Appeals cannot be said to be here for review because not only is there no pretense of an appeal from that judgment, but also more than a year had elapsed after the rendering of that judgment before this appeal was taken.

It would therefore seem that in no event is the receivers' liability before the court for adjudication.

IV.

If this court has jurisdiction of this case, then the judgment of the Court of Appeals should be affirmed. Since the decision of this case in the lower court a case on all fours with this, between this same receiver and another of its employes, was fully argued in the Kansas Supreme Court by the same counsel who represents the receiver in this case, and was by that court fully considered, and the full court sustained the liability of receivers, and gave the same construction to the Kansas statute which governs this case as was given to it by the Court of Appeals. After stating the case, disposing of some minor questions, and then quoting the Kansas statute, par. 1251, Gen. St. 1889, set out in full in the third paragraph of my Statement of Facts in this brief, the court say:

"The trial court charged the jury that this section did apply in this case. It is contended with great earnestness, on behalf of the plaintiff in error, that this section of the statute does not, in terms, apply to receivers; that it gives a cause of action where none existed at common law; that such a statute must be strictly construed; that it cannot be extended to embrace parties not included within its terms; that receivers are not railroad companies, but officers of the court, and cannot be held liable for injuries received by one employe through the negligence of another. The argument in support of this contention by the learned connsel for the plaintiff in error is clear and forcible, and presents in all its strength, as it appears to us, that side of the question, and his position is sustained by decisions of the supreme court of Georgia and Texas under very similar statutes. It is contended that to include receivers is to interpolate, by judicial legislation, that which the legislature has omitted from the statute. Many authorities are cited denying to the court any such power. It is also urged that this court, in the case of Beeson vs. Busenbark, 44 Kan. 669, 25 Pac. 48, has practically decided this question in accordance with that view. That was an action against Beeson & Selden, who were contractors engaged in the construction of a railroad. They used engines and cars for the transportation of materials, and other purposes connected with the construction of the road, and the plaintiff in that case was injured while employed in cleaning the ash box of an engine. The defendants were not a corporation, but a firm composed of private persons, and were not engaged in the operation of a railroad as common carriers, and it was held that they did not fall within the statute. We are entirely satisfied of the correctness of the decision in that case. The distinction between contractors employed in the construction of a railroad, or of some portion of the road, and a railroad company, operating under a charter from the state, as common carriers of freight and passengers, is broad and well marked. The position of a receiver, however, is in many respects anomalous. He is not, in any just sense, the owner of the property; nor is he personally interested, except in the compensation he receives for his services. On the one hand, he represents the court by which he was appointed; and the property in his charge is, in some sense at least, in the custody of the law. On the other hand he represents the interests of the corporation, and also of its creditors. The business which he carries on is public, so far as railways are highways open to the public. It is private so far as the profits derived from it are concerned. It is somewhat anomalous for courts, through the instrumentality of receivers, to conduct private business for profit;

yet the public exigencies and necessities for the continued operation of the great public thoroughfares of the country, no matter what the conflicting rights and interests of stockholders and creditors may be, have been regarded as of such force as to require the continued operation of railroads through the instrumentality of receivers, while the rights of parties litigant are being adjusted through the medium of the courts. There is no transfer of interest from the corporation to the receiver, but only a transfer of management. The business is carried on, so far as owners and creditors are concerned, for the purpose of securing a profit. This profit goes into the hands of the receiver, to be applied in accordance with the principles of law, and paid to the parties justly entitled to it. The surplus, if any, over operating expenses goes exactly where it would go if the business of the company was honestly conducted by its officers. There is still the same necessity for a multitude of employes to keep its properties in repair and working order, to operate its train service, to collect and disburse its revenues, to keep its accounts, and to protect its interests. Receivers must, in the first instance, always assume control and generalship over the army of workers they find in the employ of the company. While they have the power to employ and discharge, the general rule is that the force they find already organized is retained and used, except where found incompetent or inefficient. The receiver becomes, in effect, the general manager, charged with the general supervision of the interests of the company, not through election by the stockholders or board of directors, but by appointment of the court. He stands charged with the performance, then, of the corporate functions of the railroad company. He causes trains to be run, and freight and passengers, mails, express matter to be transported for hire. He collects all the revenues derived from the service. From them he pays all the employes for their services, and discharges all other operating expenses. In substance, then, the business of a railroad corporation in the hands of a receiver moves on as though under the direction of a general manager, to accomplish the same public purposes, to perform the same services for its patrons, to obtain for its bondholders and stockholders the same revenues as before. The receiver, when acting in pursuance of and in obedience to the orders of the court, incurs no personal liability, and has no personal interest in the profits and losses of the business. The substance, then, of the whole matter is that the railroad corporation is neither dead nor dormant. It is, in fact, alive, active, and performing its proper functions, as much as before. Its properties are in existence and utilized for the same purposes as ever. Does, then, the mere

shadow of a receivership operate to completely transform the relations its employes sustain to each other and to the assets of the company? For the life and body of a corporation are its franchises, its business, and its property. It is not a sentient being, and has no tangible or personal existence. A suit against a receiver is in form against an individual, but in substance it is against the corporate property in his charge. It is, in all essential particulars, in substance against the corporation itself. We think this is the view best sustained by the authorities, and most in consonance with reason and sound principles. 'It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, viz of body and soul. The letter of the law is the body of the law, and the sense and reason of the law are the soul of the law. Quia ratio legis est anima legis.' Intoxicating Liquor Cases, 25 Kan. 763, citing Eyston v. Studd, 2 Plow. 465. The case of Trust Co. v. Thomason, 25 Kan. 1, was an action against the trust company by an employe to recover damages under the same section of the statute now under consideration; and, although the question as to the applicability of the statute to the case of a trustee operating the road is not much discussed in the opinion, the principle on which a liability was sustained in that case is very similar to that under consideration in this. The Union Trust Company was not a railway company, and therefore not within the letter of the statute; but it was operating a railroad, and the liability, which could arise only by force of the statute, was maintained in that case. In the case of Hornsby v. Eddy, 5 C. C. A. 560, 56 Fed. 461, the identical question now before us was passed on by the United States Circuit Court of Appeals for the Eighth circuit. The statute was held to apply, notwithstanding the Georgia and Texas cases, which are cited in the opinion. The case of Trust Co. v. Thomason was regarded as, in effect, a construction of the statute in favor of the liability of a receiver. This decision was on a demurrer to the petition. The case was afterwards tried, a verdict and judgment rendered against the receivers for $15,000, the case again taken to the Court of Appeals (67 Fed. 219), and the judgment affirmed. Judge Caldwell, in delivering the opinion, says: 'An elaborate brief is filed by the plaintiff in error in support of the contention that the section of the Kansas statute referred to does not apply to receivers operating a railroad, and that, as to them, the fellow-servant rule as to the common law still obtains. This question was carefully considered when the case was first here. We are entirely satisfied with the result then reached.' Although the construction placed on the statute of this state by the Federal Court is not binding on us, the views of a court of such high

character are entitled to most respectful consideration. The Iowa statute, which in terms applies not only to the corporation, but to lessees and other persons owning or operating railroads, was held by the Supreme Court of that state in the case of Sloan vs. Railway Co., 62 Iowa, 728, 16 N. W. 331, to include receivers. In the case of Railway Co. vs. Cox, 12 Sup. Ct. 905, the Supreme Court of the United States held that, as the statutes of Louisiana anthorized an action against the receivers of a railway company for wrongfully causing the death of a brakeman, an action might be maintained in Texas against the receivers for acts done in Louisiana, notwithstanding the decision of the Supreme Court of Texas in the case of Turner vs. Cross, 18 S. W. 578. For other cases bearing more or less directly on this question, see Little vs. Dusenberry, 46 N. J. Law, 614; Farrell vs. Trust Co., 77 Mo. 477; Klein vs. Jewett, 26 N. J. Eq. 476; Murphy vs. Holbrook, 20 Ohio St. 137. Complaint is made that the verdict is excessive, but we cannot say that it is so. The judgment is affirmed. All the justices concur."

Rouse, receiver, vs. Harry, 55 Ks.—, 40 Pac. Rep. 1009.

Regardless of what this court might hold were the question open for discussion, I suppose it will not think of reversing the Supreme Court of Kansas on the construction of one of her own statutes when the question arises between two citizens of that state.

For the reasons hereinbefore assigned, I respectfully submit that the writ of error should be dismissed, or that the judgment of the Court of Appeals should be affirmed.

NELSON CASE,

Attorney for Defendant in Error.

Office Supreme Court U. S.
FILED.
FEB 27 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

HENRY C. ROUSE, RECEIVER DE BONIS NON OF THE MISSOURI, KANSAS & TEXAS RAILWAY,
PLAINTIFF IN ERROR,
vs.
JOHN E. HORNSBY.
No. 706.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PLAINTIFF IN ERROR AGAINST MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

HENRY C. ROUSE, RECEIVER DE BONIS NON OF THE MISSOURI, KANSAS & TEXAS RAILWAY,
PLAINTIFF IN ERROR,
vs.
JOHN E. HORNSBY.
No. 96.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

ARGUMENT AGAINST MOTION TO DISMISS.

This is a jurisdictional question, and it is all-important that the facts disclosed by the record shall be accurately set forth.

It is true as stated in the statement of facts of the brief of counsel for the motion (p. 6) that the plaintiff below, (the defendant in error here) by his petition sought to recover damages from the receivers of the Missouri, Kansas and Texas Railway on account of injuries sustained by him by virtue of the following statute of the State of Kansas: —

> "Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes to any person sustaining such damage."

The plaintiff, a servant or employe of the receivers, sued to recover for injuries received by him by reason of the alleged negligence of a co-employe or fellow-servant. The common law rule prevails in Kansas of non-liability of a master for injuries caused to his servant through the negligence of a fellow-servant. See Armour *v.* Hahn, 111 U. S., p. 313 (318).

It is true the above quoted statute abrogates the fellow-servant rule as to railway companies, but changes that rule in no other respect. As the receivers, duly appointed by the U. S. Circuit Court for Kansas, were operating the railway at the time of the injury, they are not liable unless by judicial construction the words "railroad company" can be held to mean receivers of a railroad company.

It is not true, as stated in the argument of counsel for the motion to dismiss, that

> "had the case at bar been an original one the Federal court would have had no jurisdiction, as all of the parties,— the intervener, the railway company, the receivers — are citizens of Kansas."

On the contrary, had the suit in the first instance been instituted in the Federal court as a law action that court would have had the fullest and amplest jurisdiction of the case on the solid ground that the receivers were the officers of a Federal court, and therefore a suit against them was one arising under the constitution and laws of the United States. This is expressly and conclusively determined by the case of Texas & Pacific Ry. Co. *v.* Cox, 145 U. S. 593, wherein a plaintiff sued Federal receivers directly for personal injuries in an action at law. It is equally true that had the plaintiff below sued the receivers in a State court for the injury complained of they could have removed the case to the Federal court, and it would there have proceeded as an action at law, and the jurisdiction of the Federal court would have depended solely on the fact that the suit was one arising under the constitution and laws of the United States.

We concede that the record in this case shows that the original petition of the plaintiff below was headed in its venue clause as in the original foreclosure suit in which the receivers were appointed, and called a petition of intervention. There is nothing in the printed record filed here and on which the motion is based, or in the transcript on file in this court from the Circuit Court of Appeals, which shows that the so-called petition of intervention was filed by leave of the court in the main foreclosure cause. There is in the introductory clause of the so-called petition of intervention a statement that the plaintiff availed himself of the rights, privileges and provisions of the order of the court made in the main cause on June 8, 1889, and sought the protection thereof, but there is nothing in the record showing such order or any of its substantial provisions.

We may concede outside of the records preserved in this court in this proceeding, that in the main foreclosure

cause there was an order requiring those who had claims against the receivership to present them by intervention within a stipulated period. We cannot concede that there was any clause in any such order that allowed the petition of intervention to be filed without special leave of court. With permission of opposing counsel we should be glad to submit to the court the order in the main cause of June 8, 1891, referred to in the alleged petition of intervention. The so-called petition of intervention was, as the record discloses, filed without any special leave of court. We claim that it is immaterial what it was originally called, and that the important question is how, after being filed, it was treated. Our position is that from the time that it was filed, down to the filing in this court of the argument of plaintiff's counsel to dismiss, it has been treated by the plaintiff and by the courts below as an independent action at law. The receivers filed their answer, making no technical objection, and asked that the petition be referred to a master in chancery to take proofs and report his findings. Upon the objection of the plaintiff that the action was one at law the Circuit Court refused to refer the case to a master, and upon the motion of the plaintiff and against the objection and protest of the receivers, directed that it be tried before a jury. See T. R., pp. 20–21. To these rulings of the court the receivers excepted as to rulings in an action at law, and which exceptions were by the trial court allowed. The court gave instructions to the jury and refused instructions, as in a law action, and in the trial of the case before the jury and in the rendition of the judgment upon the verdict treated the action as at law. Among the other instructions given the jury was the following:—

> "You are the judges, the sole judges, of the weight of the evidence and the credibility of all the witnesses."

The judgment of the court (T. R. 24), shows that it is a judgment at law finding the specific sum of $15,000 the amount of the verdict as due from the receivers, and directing the payment thereof by the receivers, and adjudging that if not paid by the receivers that the property of the railway company remain liable therefor, and by such judgment time was given to present and prepare a bill of exceptions, which was afterwards prepared, allowed, signed and filed by the judge trying the case. The receivers took the case for review to the Circuit Court of Appeals in two ways: first, by appeal, and second, on writ of error. At the hearing by the Circuit Court of Appeals that court dismissed the appeal on the ground that the suit was an action at law, and sustained its jurisdiction upon the writ of error, and affirmed the case, treating it as a law action. Judge Caldwell, who delivered the opinion of the Circuit Court of Appeals, in the course of his opinion stated:—

> "While the intervening petition was filed in a chancery suit, it had no relation to any equitable issue, and presented only a cause of action at law which the court very properly impaneled a jury to try. For all practical purposes it was an action at law against the receivers, and the Circuit Court did right in treating it as such. The plaintiffs in error preferred several requests for instructions, which were refused, and excepted to the instructions given. The instructions which the plaintiffs in error asked the court to give, so far as they are good law, are embodied in the charge of the court."

And the opinion continues sustaining the instructions, and saying they properly guided the jury.

And the opinion further states:—

> "The court is asked to reverse the case on the ground that the damages assessed by the jury,

$15,000.00, were excessive. The jury is the tribunal appointed by law to assess the damages in such cases and their finding upon that question is conclusive in this court. The judgment of the Circuit Court is affirmed.

"This cause was brought here by both writ of error and on appeal, the defendants being in doubt whether this court would treat the intervening petition setting up a legal demand accruing against the receivers as an action at law or a suit in equity. As the intervening petition set up a cause of action exclusively cognizable at law and was tried by jury as such, a writ of error was the appropriate mode of bringing the record into this court.

The appeal in this case will therefore be dismissed."

In determining the rights of the parties to this record, this court should regard substance and not shadow, and in dealing with this case should treat it as did the trial court and the Circuit Court of Appeals, as a law action and not as an intervening suit in an equity cause. The jurisdiction of the Circuit Court in the railway foreclosure cause was the jurisdiction of a court of chancery and not of law, and when, at the request of the plaintiff below, the trial court set this case outside of its chancery jurisdiction and dealt with it as a law case the same precisely as if the suit had been styled an independent suit and independently docketed, we are justified in insisting that it shall continue to be treated as such independent suit. Considered as such independent suit the jurisdiction of the court below depended not at all upon the citizenship of the parties, but upon the central and controlling fact that the receivers, in their official capacity as officers of a Federal court, acting under the general orders and directions of such court in the operation of the property committed to their charge, were sued, and the suit was one arising under the constitution and laws of the United States. The plaintiff below

now asks this court to treat this as a part of a chancery cause for the purpose of shutting off appellate jurisdiction of this court under the doctrine announced in the case of Rouse *v.* Letcher, 156 U. S., p. 47.

Why treat it in this proceeding in error, at this stage in the history of the case, as a part of the chancery cause when the lower courts at every substantial step in the case have treated it as a law action and not a suit in chancery? The receivers have never had the benefit of the judgment of a chancellor on the plaintiff's alleged cause of action. While a chancellor, under the rules of equity jurisprudence, may, at his discretion, for the purpose of aiding and advising himself, take the opinion of a jury upon a controverted question of fact, yet such opinion of the jury can only be treated by him as advisory. If the verdict of the jury commends itself to his approval, he can adopt it, otherwise he can set it aside or modify it at pleasure. On the other hand, a court of law must look upon the jury as a tribunal to whose verdict the parties have a constitutional right to require their controversy to be submitted. The jury likewise have a constitutional jurisdiction to pass upon controverted facts, and if within the domain of their jurisdiction, with nothing but proper evidence before them, and all of the law pertinent and asked by the parties correctly expounded to them, they render a given verdict, then that verdict is conclusive because it is a matter within their exclusive jurisdiction.

In the case of Rouse *v.* Letcher, the intervening petition was treated as a proceeding in chancery. The issues joined by the intervening petition and the answer thereto were referred to a master, testimony was taken according to the rules of equity, and the cause heard as an equitable cause by the trial court and by the Circuit Court of Appeals. In that case the judgment of the Circuit Court was the judg-

ment of the trial chancellor, and the judgment of the Circuit Court of Appeals was the judgment of the appellate chancellors. In the case at bar the trial judge did not consider the rights of the parties as a chancellor, and the Circuit Court of Appeals expressly refused to consider the case from the stand-point of chancellors.

Can there be any doubt that if the case at bar had been originally instituted in the Circuit Court of the United States for the District of Kansas as a law action, entitled John E. Hornsby *v.* Geo. A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas and Texas Railway, and a trial by jury had and a verdict favorable to the plaintiff rendered, and a writ of error taken to the Circuit Court of Appeals and there affirmed, — can there be any doubt but what, under the plain provisions of the law creating the Circuit Court of Appeals, this court would have jurisdiction to review the case on writ of error? We submit that there is no more doubt upon that proposition than if the case had been originally instituted in the State court and by the receivers removed to the Federal court, and there tried as an action at law, and writ of error allowed to the Circuit Court of Appeals, and from the Circuit Court of Appeals to this court.

This case is so important and involves such a large amount, and other similar cases being dependent upon it, we will, although it involves some repetition, further elaborate our argument supporting the appellate jurisdiction of this court.

Section 6 of the act of March 3d, 1891, provides that,

> "The judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different States." * *

This case, as is apparent from so much of the record as is printed, does not fall within that provision of this act for the very good reason that it is not a case wherein the United States Circuit Court had jurisdiction solely by reason of the diverse citizenship of the parties.

Section 3 of the act of March 3, 1887, provides as follows:—

> "That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice."

Previous to the enactment of this statute a receiver appointed by a Federal court could not be sued except by petition in the cause wherein he was appointed unless the suitor first obtained leave of the court making the appointment to bring such suit. But by virtue of this act a receiver appointed by a Federal court can be sued in a State or Federal court, without the previous leave of the court which made the appointment. So that the jurisdiction of the Federal court in the foreclosure suit over the claim presented by Hornsby in this case was not exclusive. If Hornsby had brought his action in the State court and it had been prosecuted there to final judgment, the question of the jurisdiction of the State court could not have been successfully contested; but the State court could have been ousted of its jurisdiction by removal to the Federal court upon the ground that the cause of action was a suit at law arising under the constitution and laws of the United States, and it would have been treated as a

separate case from the foreclosure suit and tried as such, just as this case was treated and tried by the Circuit Court. That it could have been removed upon the ground that it is a suit at law arising under the constitution and laws of the United States, had it been commenced in a State court is fully sustained by

Buck *v.* Calbach, 3 Wall. 334;
Feibelman *v.* Packard, 109 U. S. 431;
Bock *v.* Perkins, 139 U. S. 628;
Evans *v.* Dillingham, 43 Federal Reporter, 177;
Sowles *v.* First National Bank, 43 Federal Reporter, 700;
Hardwicke *v.* Keene, 26 Southwestern Reporter, 589;
Jewett *v.* Whitcomb, 69 Federal Reporter, 417;
Railroad Co. *v.* Cox, 145 U. S. 593.

Hence, the jurisdiction of the Circuit Court was not dependent wholly and entirely upon the diverse citizenship of the parties. The parties to this suit are all citizens of the same State. The defendant in error is a resident of Kansas. The receivers were residents of Kansas. The corporation, whose property was handled by the receivers, was organized under the laws of the State of Kansas. So, as to the controversy between Hornsby and the receivers the jurisdiction of the Federal court was not dependent entirely upon the diverse citizenship of the parties. In fact, it was not dependent at all upon such citizenship, but was dependent upon the fact that it was a suit at law arising under the constitution and laws of the United States, and upon that ground if it had been brought in a State court could have been removed from the State Court to the Federal court. There was nothing to compel the defendant in error to present his claim by petition of intervention. He had his choice of remedies: he could bring it

by petition of intervention as an equitable proceeding in the equity foreclosure suit, or he could commence in a Federal State court without asking permission of the court which appointed the receivers. If he proceeded by intervention he would have to first obtain leave of the court by appropriate order in the main suit. Does the fact that this choice of forums and choice to treat and have treated his case as an action at law deprive the receivers in this case of their appellate rights simply because he styled the case an intervention? If he had commenced his action directly in the State court the receivers would have had the right to remove the case to the Federal court and they would have had the right of appeal to this court in case of adverse decision. So if he had commenced in the Federal court. Are they to be deprived of the right of appeal by the fact that the defendant in error in this case called his action in the first instance a petition of intervention instead of commencing an independent action in a State or Federal court? How is the defendant in error given any right to oust the Federal court of its appellate jurisdiction in this case? The mere fact of commencing by petition in United States Circuit Court cannot in any way deprive these receivers of their right to appeal to this court.

In the case of

> Railway Company *v.* Cox, 145 United States, 593; *s. c.* 12 Supreme Court Reporter, 1295,

this court decided,

> "As jurisdiction without leave is maintainable through the act of Congress, and as the receivers became such by reason of and derived their authority from and operated the railroad in obedience to the orders of the Circuit Court in the exercise of its judicial powers, we hold that jurisdiction existed because the

suit was one arising under the constitution and laws of the United States; and this is in harmony with previous decisions."

Buch *v.* Colback, 3 Wallace, 334;
Feibelman *v.* Packard, 109 United States, 421; *s. c.* 3 Supreme Court Reporter, 289;
Bock *v.* Perkins, 139 United States 628; *s. c.* 11 Supreme Court Reporter, 677;
Tennessee *v.* Bank of Commerce, 152 United States, 454; *s. c.* 14 Supreme Court Reporter, 654;
McNulta *v.* Lockridge, 141 United States, 327; *s. c.* 12 Supreme Court Reporter, 11.

These cases are all to the point that where a party is exercising authority under an appointment and by virtue of instructions from a Federal court, as a receiver of property and is sued in relation to his trust, such suit is one arising under the constitution and laws of the United States, and Federal cognizance is conferred (by this condition) irrespective of any questions of citizenship, and the right to removal follows, as of course

Union Pacific Ry. Co. *v.* Harris, 15 Sup. Ct. Reporter, 843;
Railroad Company *v.* Amato, 144 United States, 465.

In both of these cases the right to an appeal to theSupreme Court from the Court of Appeals was upheld and sustained upon the ground that the jurisdiction of the Circuit Court was not dependent entirely upon the diverse citizenship of the parties.

In the case of

Union Pacific Railway Co. *v.* Harris, *supra*,

we desire to call the court's attention to the language of its Chief Justice who rendered the opinion:—

"In the present case jurisdiction was invoked on the ground of diverse citizenship; and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental; and further that as the case did not involve the validity or construction of the charter of the plaintiff in error, no Federal question arose. It is not for us to inquire why writs of error to Circuit Courts of Appeals in actions for damages for negligence of railroad corporations should be allowed simply because the corporations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language. Nevertheless, as plaintiff below appears to have really proceeded on the ground of diverse citizenship, we think there was color for the motion to dismiss, *although, as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it.*"

That case was removed from the State court to the Federal court and the only claimed ground of the removal was the diverse citizenship of the parties. Hence, as the Chief Justice remarks, the jurisdiction of the Federal court was sought upon the ground of diverse citizenship and not upon any other ground. But when it was sought to deprive the railroad company of its right to an appeal to this court, the fact was then pointed out that the Union Pacific Railway Company was a Federal corporation, a corporation organized under the laws of the United States, which in and of itself would have given the Federal court jurisdiction of the suit, and it could have been removed to the Federal court upon that ground, but it was not; yet its right to an appeal to this court was sustained because the right existed, although the jurisdiction of the Circuit Court had not been invoked on that ground. Is not that case an authority in this case? If this case had been commenced in the State court it could have been removed upon the

ground that it was a suit arising under the constitution and laws of the United States, and notwithstanding the diverse citizenship of the parties to the suit in which the receivers were appointed, they would have had the right of appeal to this court. The fact that the defendant in error chose to commence his action in the Federal court and to call himself an intervener, ought not to be permitted to deprive the plaintiff in error of his right to an appeal to this court. While the defendant in error styles himself an intervener, yet he is not, in fact, an intervener. He had no interest in the controversy between the Mercantile Trust Company and the Missouri, Kansas & Texas Railway Company. He does not by the very terms of his petition attempt to establish an interest in that controversy. What his petition sets up is, that he was an employe of the receivers and that he was injured in their service through the negligence of a co-employe, and that the receivers are liable to him for whatever damage he has sustained by reason of his injury. Do the facts alleged in the petition constitute an intervention in the case of the Mercantile Trust Company *v.* the Missouri, Kansas & Texas Railway Company? He sets up an independent cause of action, independent of the controversy between the Mercantile Trust Company and the Missouri, Kansas & Texas Railway Company, and he treats it as an independent action, and the jurisdiction of the Circuit Court is dependent, in his controversy, solely upon the fact that the receivers, at the time this defendant in error received his injury, were acting solely and only by virtue of the authority which they derived from the Federal Circuit Court, and that presents a Federal question. It has been held by this court to present a Federal question ever since the ruling of the court in the case of

Buck *v.* Colback, *supra*.

He was not treated by the Circuit Court as an intervener, nor was he treated by the Court of Appeals as an intervener. It cannot be possible that in cases of this kind this court is to be deprived entirely of its appellate jurisdiction at the will of a party who desires to bring suit against a Federal receiver; and yet that is the entire logic of the reasoning of the defendant in error in support of this motion to dismiss. He does not attempt to show and cannot show that the jurisdiction of the court was founded solely upon diverse citizenship of the parties to this suit. As to the claim presented by the defendant in error, it is not an incident to the original suit of the Mercantile Trust Company *v.* Missouri Kansas & Texas Railway Company, and has nothing to do with it.

The terms, "suit," and "controversy," as used in section 6 of the act of March 3d, 1891, are not synonymous. A controversy may arise in a suit, and that, too, between others than the original parties to the suit. It may be a mere incident to the suit, or it may be wholly independent of the suit. Take this case for illustration: the parties to the original suit are, the Mercantile Trust Company, complainant *v.* The Missouri, Kansas & Texas Railway Company, and others, respondents; but the parties to this suit, the subject-matter of which did not arise in that suit, are the receivers, who were appointed in that suit, and the claimant herein, who styles himself an intervener, neither being parties to the original suit, and the controversy or matter in dispute between the parties in the case at bar, is wholly independent of the original suit and is not even an incident to the original suit and does not arise by virtue of anything that occurred in the original suit or any issue that was joined therein, but does arise by reason of the fact, as is claimed by the defendant in error, that the receivers, in the discharge of the duty imposed upon them by the court, were negligent toward the defendant in

error, and the question of the liability of the receivers for such negligence in the discharge of their duties is a controversy arising under the constitution and laws of the United States. While the decision of the Court of Appeals in the suit of the Mercantile Trust Company *v.* The Missouri, Kansas & Texas Railway Company, in which the receivers were appointed, would be final as to the issues in that suit, yet, as to this controversy, which arises outside of that case, the decision of the Court of Appeals would not be final, and it is not for us to inquire why this is so, but it is sufficient that Congress meant something by the word, "controversy," and that is, that the jurisdiction of this court should be protected as to all matters arising in suits determined by the Court of Appeals, whether between the original parties thereto, or others, when the subject of the controversy was one properly for the decision of this court. And that too irrespective of whether the judgment of the Court of Appeals was conclusive in the original suit. All the authorities which we have cited herein are to the effect that when the act complained of is done under and by virtue of authority derived from a Federal court, as a wrong committed by a receiver appointed by a Federal court, or by a United States marshal in the service of process issued from Federal court, or the act complained of is that of a corporation organized or chartered under the laws of the United States, as a Federal railway corporation or a national bank, the action therefor is one arising under the constitution and laws of the United States, and it makes no difference where commenced or pending. As stated before, it is not reason and it is not common sense to say that it lies with the claimant to defeat the right of plaintiff in error to his writ of error to the Court of Appeals, by calling himself an intervener and appearing with his petition in the Federal court, instead of commencing an independent action in a State or Federal court.

The Letcher case, referred to by the defendant in error, n the 156 United States, is not an authority, for the very good reason that in that case Letcher presented her petition for intervention to the Federal court and had it treated as a petition of intervention. It was presented to the equity side of the court and was referred by the court to a master instead of to a jury. The court was asked to determine the merit of her claim as an intervener, and to determine that she was an intervener who had a claim upon the funds in the hands of a receiver. No such issue was tendered in the case at bar, and no such order was made. The question, whether the defendant in error has any claim whatever upon the funds in the hands of the receiver is yet to be determined after the question of liability has been finally settled by this court. In the action at law he may be entitled to his judgment against the receiver, and it may appear upon investigation that there are no funds out of which he is entitled to receive his pay. In the Letcher case the main question was whether she was entitled to receive her pay out of the funds in the hands of the receiver. Letcher did not present her claim as an independent and legal demand against the receiver, but as a party claiming an interest in the main suit. Her claim was treated as part of the main suit, inasmuch as it was not considered independent of the main suit, as was the case at bar. Such must be the true construction of the opinion in the Letcher case, otherwise it is at variance with the opinions in Railway Company *v.* Amato and Union Pac. Ry. Co. *v.* Harris, *supra*.

The fact which appears right on the face of the petition of the defendant in error which was filed in the Circuit Court and which is found on pages 3 to 8 of the printed record in this case, that this action could have been prosecuted in the State or Federal court without the previous leave of the Circuit Court which appointed the receivers

under and by virtue of the provision of section 3 of the act of March 3d, 1887, is conclusive that this is not an ancillary proceeding. Ancillary means a proceeding dependent upon or which aids another proceding considered as principal: —

Rapalje & Lawrence's Law Dictionary, page 58.

Auxiliary, subordinate: —

Bouvier's Law Dictionary, page 121.

Hence, the proceeding commenced by the defendant in error by what he calls his petition of intervention was no more an intervention or ancillary proceeding than it would have been had he commenced his action in the State court, as he might have done, or commenced directly in the Federal court.

Another reason why this court should take jurisdiction of this case is, because the plaintiff in error prior to the decision of the Circuit Court of Appeals, when the case was before it the second time, requested that court to certify certain questions to this court, which motion to certify is found on pages 45 and 46 of the printed record, and the ruling of the court thereon is found on page 47 of the printed record. As we understood at the time, and now understand, the Circuit Court of Appeals was induced to overrule the motion to certify this question to this court for the reason that the Circuit Court of Appeals believed that the plaintiff in error was entitled to his writ of error to this court as a matter of right. While it does not appear in the record, yet Judge Caldwell publicly so stated from the bench in passing upon the motion. While this may not be a controlling legal reason, it is certainly persuasive for the question which the Court of Appeals was requested to certify is one of

very great importance and one that sooner or later will reach this court in some shape. It was probably not necessary to request the Circuit Court of Appeals to certify this question, in view of the fact that we have the absolute right to a writ of error, and having that right, the Court of Appeals was probably correct in overruling the motion to certify any question in this case to this court.

This disposes of points of argument numbered 1 and 2 in the brief of the defendant in error.

We next proceed to a discussion of the motion of defendant in error to affirm the judgment of the Circuit Court of Appeals.

Argument against Motion to Affirm.

The first ground upon which an affirmance is asked is that a former decision of the Circuit Court of Appeals in this case is conclusive as *res adjudicata* upon the receivers. The facts connected with the former decision are: After the plaintiff filed his petition in the court below the receivers demurred to it on the ground that it constituted no cause of action, and the trial court sustained the demurrer. The plaintiff stood upon his petition and judgment was rendered thereon in favor of the receivers. The substantial question decided by the trial court was that the Kansas statute making railways companies responsible for injuries done by an employe to a co-employe did not apply to receivers. The plaintiff sued out a writ of error to the Circuit Court of Appeals, and that court decided that the demurrer was wrongfully sustained and should have been overruled, and reversed the case, remanding it to the court below for further proceedings, but entering no final judgment. After

the case was remanded, on issue joined by the answer of the receivers, the same was tried by the court and jury, resulting in verdict and judgment for the plaintiff, from which this writ of error is prosecuted. There is nothing in the printed record, showing the extracts from the transcript of record which has been printed by counsel for the defendant in error in order to submit his motion to dismiss or affirm, which justifies any reference to the former decision of the Circuit Court of Appeals. Upon this question of *res adjudicata* we submit:—

I.

A plea of res adjudicata, to be available as a defense, must be founded upon a judgment upon the merits and must be final and conclusive of the subject-matter in controversy in a previous action between the same parties.

In this case there is no plea of *res adjudicata*. The defendant in error attempted to raise the question of *res adjudicata* in the Circuit Court of Appeals by motion (see pages 43 and 44 of the printed record in this case). There was no formal plea of *res adjudicata*, and the only foundation for the claim was, that the petition filed by the defendant in error in the Circuit Court had been dismissed by that court upon sustaining a general demurrer thereto, which demurrer was upon the ground that said petition did not state facts sufficient to constitute a cause of action. This decision or ruling of the Circuit Court was reversed in the Circuit Court of Appeals, and the decision of that court in reversing the judgment of the Circuit Court is found in the

5 Circuit Court of Appeals Reports, 560.

It will be observed upon reading the opinion of the Circuit Court of Appeals that no judgment whatever was rendered by it. The decision of the court below was reversed and the cause remanded with instructions to the Circuit Court to overrule the demurrer to the petition and to proceed with the trial and decision thereof in a manner not inconsistent with the decision of the Circuit Court of Appeals. So that the first ruling had upon the demurrer, of which the plaintiff in error in this case could complain, was when the Circuit Court, in obedience to the command of the Circuit Court of Appeals, overruled the demurrer, and it is that ruling of the Circuit Court of which we are complaining now. No final judgment was rendered by the Circuit Court of Appeals. In fact, it commanded the Circuit Court to proceed with the trial of the cause, and all that is decided by the Court of Appeals in that decision is, that the petition filed by the defendant in error in the Circuit Court did state a cause of action. But the judgment of the Circuit Court of Appeals cannot be construed to be final in any sense whatever, and it did not terminate the action or dispose of any issue in the action. We complain of the Circuit Court overruling the demurrer. The action was again brought to the Circuit Court of Appeals and that was one of the errors assigned, and the Circuit Court of Appeals sustained the Circuit Court in its ruling upon the demurrer, and we now complain of the action of the Court of Appeals in sustaining the Circuit Court in overruling the demurrer.

The plea of *res adjudicata* to be good, must be founded upon a judgment which is final and conclusive as to the rights of the parties in the case. Now, if we understand the position assumed by the defendant in error in his motion, he attempts to raise the plea of *res adjudicata* in this case by motion to dismiss and it is the ruling of the Court of Appeals on the first appeal in reversing the Circuit Court

which he claims is *res adjudicata* upon this question. When the case was before the Court of Appeals the second time, the defendant in error sought to raise this question of *res adjudicata* by a motion to dismiss or affirm, but his motion was overruled (see page 47 of the printed record). He is now here attempting, without any writ of error or appeal from the ruling of the Court of Appeals thereon, to raise the same question by a motion directed to this court.

If there is anything in the plea of *res adjudicata* it is against the defendant in this case, for in order to have availed himself of that plea he should have saved his exception and brought the question to this court from the Court of Appeals where he had raised the question or attempted to raise it and had been defeated. He has submitted to that ruling of the court and has not attempted in any way to bring up the ruling of the Court of Appeals upon his motion to dismiss or affirm in that court, upon the plea of *res adjudicata*.

We understand a judgment has no effect upon any subsequent action unless it has been actually rendered and is final.

A judgment appealed from is not final until the appeal has been determined. If a new trial is granted or a case is referred back and reversal of the judgment ordered it does not conclude the parties in a subsequent trial from raising the same question. The order of reversal by the reviewing court is not such a final determination of the action as can be appealed from. Upon the decision of the Court of Appeals reversing the ruling of the Circuit Court upon the demurrer this court would not have entertained a writ of error to the Circuit Court of Appeals for the reason that its order reversing the Circuit Court did not determine the action. No final judgment was rendered there and no judgment was rendered in this case against the plaintiff in error until the Circuit Court, in obedience to the Court of

Appeals, overruled the demurrer and proceeded with the trial. While we think that the decision of the Court of Appeals in the first instance was erroneous, yet as it did not result in a final judgment against the plaintiff in error in this case, he could not obtain a review of such decision.

The way in which the defendant in error seeks to apply the principle of *res adjudicata* in this case is, to say the least, novel. It would occur to us that a bare statement of the principle of *res adjudicata* would be sufficient to show that it does not pertain to any issue to be tried in this case. If the Court of Appeals did render a judgment, as is claimed by the defendant in error, it does not appear in the printed record in this case, nor is it in the manuscript record filed in this court, and there is no pleading which sets it up. But, beyond all that, the opinion which is cited in the brief of the defendant in error does not purport, upon its face, to be a judgment, and does not purport, on its face, to order the rendition of a judgment by the Circuit Court, and until a final judgment is rendered in the cause there is nothing for this court to review. The proposition is so plain, so fundamental and so familiar to every lawyer that authorities are unnecessary to sustain it. But notwithstanding the familiarity of the question to every member of this court, we will venture to call the court's attention to the case of

Tippecanoe County *v.* Lucas, Treasurer, 3 Otto, 108,

and quote a portion of what the court says in the opinion:—

> "It is objected, *in limine*, that this court has no jurisdiction of the cause, on the alleged ground that the judgment rendered is not a final judgment. The order of the Circuit Court, granting a preliminary injunction, was, it is true, interlocutory, and, if the judgment of the Supreme Court of the State had been limited to a simple reversal, the objection would have

been tenable. The cause would then have remained in the Circuit Court for further proceedings. But the direction to that court, accompanying the reversal of its order to dismiss the complaint, made a final disposition of the cause. With the entry of that judgment the cause was at an end."

This, to the point, that where the judgment upon a demurrer does not finally dispose of the case it is not *res adjudicata*. There are other opinions of this court to which we might call the court's attention, but we do not deem it necessary to do more than cite them:—

Aurora City *v.* West, 7 Wallace, 82;
Hughes *v.* United States, 4 Wallace, 332;
Gould *v.* Evansville, etc., R. R. Co., 91 U. S. 526.

The next ground upon which the defendant in error claims the case should be affirmed is that the statute of Kansas abolishing the fellow-servant rule as to railway companies applies to receivers of railways acting under authority of court. Upon this proposition we beg to present at length our argument nearly as fully as we had intended to present it at the hearing of the case upon its merits.

II.

The defendant in error and those of whose negligence he complains were fellow-servants.

We presume there will be no contest over this question. Practically the question has been admitted on every trial of this cause, and we do not understand that any serious contention will be made. Should the court desire to in-

vestigate this question we refer to the rule laid down by this court in the case of

Randall *v.* Baltimore & Ohio Railway Company, 109 U. S. 478,

where it held that a brakeman of one frieght train and an engineer of another freight train were fellow-servants. The fact that the engineer was in control of the train did not constitute him the representative of the company beyond the management of his own train, and consenequtly he was held to be the co-servant of the brakeman of the other freight train, over whom he had no authority. In our judgment this is a correct statement of the rule with reference to fellow-servants. The case of

Railroad Company *v.* Ross, 112 U. S. 377,

is sometimes claimed as authority for a different rule from that established by the case of

Randall *v.* B. & O. Ry. Co., *supra*,

but upon a careful consideration of the Ross case it will be seen that the facts in the two cases are entirely differ ent. In the Ross case the engineer was injured through the negligence of the conductor of the same train, the conductor being in charge of the train and the engineer under his orders. That placed the conductor, as to the engineer, the representative of the company. As to the movement of his train and as to giving orders and instructions to the engineer he was the company, standing in its place, its representative and spokesman, through whom it managed and controlled that particular train. But, it will be observed that no such relation existed between the engineer, whose neg-

ligence caused the injury, and the complainant in the Randall case. The brakeman was not under his control or orders. The railroad company was not controlling the brakeman through the engineer, and as to the brakeman, the engineer did not represent the company and was not its spokesman. This distinction is very clearly pointed out in the very able opinion by Judge Sage in the case of

B. & O. Ry. Co. *v.* Andrews, 50 Federal Reporter, 782.

In the case at bar the baggageman on passenger train No. 9, the defendant in error in this case, in his petition only complains of the negligence of the conductor and engineer of freight train No. 58, and the testimony shows that the only negligence, if any, was that of the engineer. He alleges that it was through the negligence of said conductor and engineer that he received his injuries. There is no charge that the receivers were negligent in the employment of the conductor and engineer of freight train No. 58, or that they were not ordinarily careful and prudent men in the discharge of their respective duties. We also call the court's attention to the following authorities:—

Baugh *v.* B. & O. R. R., 149U. S. 368;
Enwright *v.* T. A. A. & N. M. Ry. Co., 53 N. W. Reporter, 536;
Newport News & M. V. Ry. Co. *v.* Howe, 52 Federal Reporter, 362;
Clark *v.* Penn. Ry. Co., 31 N. E. Reporter, 808.

III.

The plaintiff below, therefore, is attempting to recover by virtue of a statutory right and must bring himself within the terms of the statute creating and giving such right.

Plaintiff bases his right to recover entirely upon Sec. 1251 of the General Statutes of Kansas of 1889, which section reads:*

This statute was Section 1 of Chapter 93 of the laws of 1874, approved March 4th, 1874. This statute changes the common law rule and makes railroad companies organized in Kansas or doing business in that State liable to a servant for injuries which may be caused solely by the negligence and want of proper care of a co-employ or servant. Its effect is to give a cause of action and right of recovery where none existed at common law. It is not the enlargement of a common law right; it is the creation of a right or liability unknown to the common law and gives the injured party a right to recover where that right had been repudiated and denied under the common law as it existed prior to 1874. Hence the statute must be strictly construed, and cannot be extended to embrace parties not within its terms. It does not pretend to give this right to all employes engaged in the dangerous business of operating trains upon railroads, nor does it pretend to extend the liability to co-partnerships, individuals or others who may be operating railroads, and yet not organized and incorporated as railroad companies or corporations. The liability is confined to just two classes, railroad companies organized in Kansas, and railroad companies which may be organized outside of Kansas but doing business in that State as a foreign corporation. We contend the Supreme Court of Kansas in the case of

* "Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes to any person sustaining such damage."

Beeson *v.* Busenbark, 44 Kan. 669, so construed this statute long before the cause of action in the case at bar arose, and we desire to quote a portion of its opinion commencing on page 672:—

> "The statute referred to was passed in 1874. Its title is, 'An act to define the liability of railroad companies in certain cases.' The statute so far modifies and changes the common law that a servant or employe of a railroad company may maintain an action against such railroad company for any injury received while in the line of his employment, through the negligence of a fellow-servant, or employe engaged with him in the same common work of the master or employer, unless such injured servant or employe has himself been guilty of negligence or want of ordinary care, which has directly contributed to produce the injury complained of. Previous to the statute of 1874 the rule of law which prevailed in this State, exempted from liability all employers, including railroad companies, for injuries to their employes, caused by the negligence or incompetency of a fellow-servant, unless they had employed such negligent incompetent servant without proper inquiry as to his qualifications or had retained him after knowledge of his negligence or incompetency. * * * This was the rule of the common law. But this rule of the common law was abrogated by the statute of 1874, so far as it related to railroad companies organized in this State or railroad companies doing business in this State. The statute of 1874 fixes a new liability upon railroad companies doing business in this State. This statute is in derogation of the common law; therefore it is not to be extended by implication or construction."

Again, the court says on page 673:—

> "*The statute of 1874 is to be construed strictly. It cannot apply to masters or employers not within its terms. Neither can it be construed to give protection to persons not in the employ of a railroad company.*

The statute has reference to servants and employes of railroads — not to servants or employes of other companies or corporations."

As early as the 7th Kansas the Supreme Court of that State laid down the following rule regarding the construction of a statute:—

"The true way for courts to ascertain the legislative intention is to observe and be guided by the language of the statute, and if this be clear and free from ambiguity there is nothing left for interpretation; for when the act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which it naturally presents. *To go elsewhere to obtain something to enlarge its meaning is to endeavor to elude it.*"

Fitzpatrick *v.* Gebhart, 7 Kan. 35.

The same rule of construction was followed by the Supreme Court in the cases of:—

In re Hinkle, 31 Kan. 712;
Ayers *v.* Trego County, 37 Kan. 240.

These three last cases determine the rule for the construction of all legislative acts. The Beeson case is a construction of the extent and scope of the statute under which the defendant in error in this case seeks to recover. In Beeson *v.* Busenbark, from which we quoted Beeson and Seldon were engaged in operating a railroad; they were hauling freight and passengers for hire and at the same time they were engaged as railroad contractors in building a railroad, and were transporting over the railroad which they were operating and building, material for construction. Busenbark was a fireman in their employ, and he was injured through the negligence of a co-servant and claimed the right to recover of his employers under

and by virtue of the Kansas statute in question. The plaintiff in that case contended that the statute gave the right of recovery to all who might be engaged in the dangerous business of operating trains upon railroads, while the defendants claimed that the intention of the statute was to give the right to recover only to the employes of railroad companies organized in the State, or railroad companies doing business in the State, and that it was not the intention of the statute to give the right of recovery in such cases to any who might be injured in the dangerous business of railroading, regardless of whether he was in the employ of a railroad company or not, and the Supreme Court construed the law strictly and held that it could not be extended beyond the language used in the statute, and as the language used is "railroad companies organized in the State or railroad companies doing business in the State," it must be presumed that the legislature intended to confine the liability entirely to the parties described in the statute, and it was not the province of the court to extend it by construction.

On the trial of the case in the District Court the court sustained the claim of Busenbark, the injured fireman, and held that Beeson & Seldon were liable, and such liability was based upon the fact that said firm of Beeson & Seldon, for whom Busenbark was working, actually operated trains upon a railroad, and the court instructed the jury as follows: —

> "It is sufficient that they actually operated trains upon the road, either by themselves or with the co-operation of others."

The trial court further instructed the jury with reference to the liability of Beeson & Seldon, as follows: —

> "If the defendants were at the time of the injury

complained of operating the Kansas & Colorado Road for the purpose of carrying construction material, *as well as freight and passengers when offered*, not connected with the road, they would be liable for the injury which one employe of the defendants might receive because of the negligence of another employe, without regard to who or what such negligent employe may be."

From the above instruction given by the trial court it is plain that the court took the same view of the law that is contended for by the counsel for the defendant in error in this case with reference to the construction of the statute. The test which the trial court applied was the risk and hazard incurred in operating trains upon railroads and the benefits of the statute were intended for all who might be injured through the negligence of a co-servant while incurring such risk and hazard. The case was reversed by the Supreme Court, as we have shown herein, and the Supreme Court emphasizes in the opinion rendered in the case the fact that the party claiming the benefit of that statute must be an employe of a railway company at the time he received the injury, and that only railroad companies are liable under the statute. Beeson & Seldon, the contractors, were operating trains on a railroad. They had engineers, firemen, brakemen and conductors. There is no attempt to show that there was any peculiarity in the construction of the trains. The contention in the case was over the construction of the statute, as to whether its benefits applied to others than the employes of railway companies who might be engaged in the same dangerous business. The operation of the trains by Beeson & Seldon was just as hazardous and the results of the injury to Busenbark just as painful and serious as though such train had been operated by a railway company; yet the Supreme Court of Kansas held that Busenbark was without a remedy because

the statute did not make individuals or companies, other than railway companies, who might be engaged in the dangerous and hazardous business of operating railways, liable, and confined the liability entirely to railroad companies. If the Supreme Court of Kansas, or any other court can say that under and by virtue of the terms of that statute a receiver is liable, there is no good reason why it cannot say by construction that an assignee or lessee is liable or that an individual or partnership is liable. It will undoubtedly be contended that there is no good reason why the legislature should not have intended the statute to apply to all who might be engaged in the dangerous business of operating railroads; but it is not for the Supreme Court of Kansas, nor is it for this court to inquire why the legislature did not so intend. The answer is, that if the legislature had so intended it would have expressed its intention in clear and unmistakable language, leaving no room whatever for doubt or uncertainty. We again quote from

Beeson *v.* Busenbark, *supra*, page 674:—

> "The legislature has authority to extend the operation of the statute to all corporations, companies, masters or employes of every occupation or business. It has not seen fit to do so. It might very properly have extended the operation of the statute to all partnerships, masters or others engaged in the work of operating trains upon railroads, or in constructing railroads or other like work. It has not done so."

This question was before the Supreme Court of Kansas in the case of

Union Trust Co. *v.* Kendall, 20 Kansas, 515,

where the point was squarely made that the Union Trust Company, then operating the Missouri, Kansas & Texas Railway,

was not a railway company, or the assignee or lessee of a railway company, and hence, not liable under Section 1252 for killing stock. The court held that the Union Trust Company was a foreign corporation and was then engaged in operating a railroad in the State, and that it was presumed, in the absence of any showing to the contrary, that it was within the power of the corporation to operate the railroad, and hence it was a railroad company, within the terms of the Statute. The language of the court speaking through Judge Brewer, is: —

> "And where a corporation is found to be engaged in a certain kind of business, it will be presumed, as against the corporation, in the absence of definite and positive proof to the contrary, that the carrying on of that business is one of the powers with which it is endowed. If a corporation is shown to be engaged in the business of manufacturing, it is proper to call it a manufacturing corporation. If it is operating a railroad is it not a railway corporation? The name of the corporation is not conclusive as to its character. The best evidence is the charter, which defines its powers. And in the absence of that the next best evidence, as against it, at least, is the business in which it actually engages, the powers it actually exercises. But it may be said that its name indicates that it is a corporation organized for the sole purpose of assuming and performing trusts; that the agreements and orders show that its acceptance of the management and control of this road is but the carrying out of a trust, and powers incidental to its discharge. This doubtless is a fair deduction from the agreements and orders. But is not a trust corporation, endowed with power in the discharge of a trust to assume the control and management of a railroad, to be deemed, while so engaged in operating and running the road, a railway corporation, *pro hac vice*, within the meaning of the act?"

This in effect decided that the Union Trust Company

was a foreign corporation operating a railroad in the State of Kansas, and hence was within the terms of the statute.

Again, this same section was before the Supreme Court of Kansas in the case of Kansas Pacific Railway Company *v.* Wood, 24 Kansas, 619, where the question came up as to the liability of a railway company for killing stock while the road was in the hands of a receiver, and it was there held that it was the duty of the company, under Section 1252, to fence the road, and hence the company was liable for stock killed on the line of the road while the road was being operated by a receiver, where the only negligence complained of was the want of a fence, and in which decision Judge Brewer, after pointing out the difference between the Indiana and Kansas statutes, in that the Indiana statute names receivers while the Kansas does not, said:—

"Is this difference vital? Our statute names assignees and lessees, but not receivers. *Expressio unius, exclusio alterius.* Was there any intent to bring the receivers within the statute? If this were a claim against a receiver, this might be a pertinent question. The omission may show that the legislature did not intend to cast any liability on a receiver; but does it not also tend at least to show that it did not intend that the appointment of a receiver should affect the liability of a corporation? Naming lessees, is it not fair to say that a lease should relieve the corporation and cast the burden on the lessee. Omitting receivers, is it not equally fair to hold that the intention was to leave the liability on the corporation, unaffected by the appointment of a receiver?"

The difference was not vital because the corporation was liable under either statute and the action was not against the receiver. But the language of the learned judge who wrote the opinion clearly indicates that he thought the legislature meant something when it practically copied the Indiana statute, except that it left out the term receivers,

and the statute is so literally construed as to make the corporation liable for stock killed at a time when the property was in the possession and control of a receiver. This again shows the intention of the legislature in adopting these two statutes, and the clear understanding it had of the matter when it adopted the Indiana statute and used the same terms except the term receivers, which it omitted in Section 1252.

When compared with other statutes it is perfectly clear that our legislature never intended to extend the liability of Section 1251 to others than "railroad companies," and Section 1252 to "railway companies or corporations or the assignees or lessees of such companies or corporations."

In the case of the Union Trust Company *v.* Thomason, 25 Kansas, 1, which was an action under Section 1251 for personal injury, the question was not before the court. Evidently it was regarded as settled in the case of the Union Trust Company *v.* Kendall, *supra.* Consequently, the only question presented to the court in the case of the Union Trust Company *v.* Thomason, *supra*, was whether a man working on the track of a railroad was engaged in the dangerous and perilous business of railroading, and it was decided that he was, and of course as he was working for a company that had already been determined to be a railway company operating a railroad in the State, he was entitled to recover under Section 1251.

The question as to whether others than railway companies were liable under Section 1251 was before the Supreme Court of Kansas in the case of Missouri Pacific *v.* Mackey, 33 Kansas, 298, in which the validity or constitutionality of Section 1251 was attacked upon the ground that it was class legislation and that it in terms made railroad companies only liable and that none save the employes of railroad companies were entitled to the benefit of the statute, and the court decided that it

was not invalid for that reason, because it applied to all railroad companies and because all employes of railroad companies were entitled to its benefits. That case was before this court on error to the Supreme Court of Kansas, where the decision of the Supreme Court of Kansas was affirmed. See, Missouri Pacific Railroad Company *v.* Mackey, 127 United States, 205. It would have been a very easy thing for the Supreme Court of Kansas or this court to have said that the language of the statute was sufficiently broad to make all companies, corporations and individuals operating railroads liable to their servants, and that the servants of all such were entitled to the benefit of it. But such construction is not even hinted at, much less expressed, in the opinion of either court. So we presume we can be pardoned for insisting that the question had been settled in Kansas at the time this suit was brought, that only railroad companies are liable under the statute and that only the employes of such companies are entitled to its benefits.

Similar statutes in other States have been construed exactly as the Supreme Court of Kansas construed this statute in Beeson *v.* Busenbark, *supra*, and we will now call the Court's attention to the statutes of other States and the construction which the Supreme Courts of such States have placed thereon. In Georgia they have a statute which reads as follows:—

> "Railroad companies are common carriers and liable as such. As such companies necessarily have many employes who cannot possibly control those who should exercise care and diligence in the running of trains, such company shall be liable to such employes as to passengers for injuries arising from the want of such care and negligence."

Section 2083 of the Code of Georgia.

And again:—

> "If the person injured is himself an employe of the company and the damage was caused by another employe without the fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."
>
> Section 3036 of the Code of Georgia.

The question whether the employe of a receiver of a railroad company was entitled to the benefit of the above sections of the Code of Georgia, was before the Supreme Court of that State in the case of Henderson *v.* Walker, 55 Georgia, 481, and we now quote what the Supreme Court of that State said with reference to the right of an employe ofa receiver under and by virtue of the terms of the above statute. Blakely, Justice, said:—

> "He (the plaintiff) rests his case on a statutory right and yet does not put himself into the only class to which the right belongs. The company owning the road had no employes. A court of equity by its officers, the receivers, had possession of the road, and the plaintiff, instead of hiring himself elsewhere to a railroad company or corporation, voluntarily hired himself to these ministers of the law. They represented not the company but the court. Doubtless the receivers as common carriers bear a relation to the public very similar to that of other common carriers, but the difference between the public and this plaintiff is that the general public can appeal to a general law applicable as against all common carriers, whereas the plaintiff must invoke a special statutory provision which will not reach all employers alike, but only railroad companies * * * It is clear that the employes of a receiver are not within the words of the Code, and to extend the words by construction would be attended with difficulties both technical and practical."

This case was followed and approved by the Supreme Court of Georgia in Thurman *v.* Cherokee Railroad Company, 56 Georgia, 376. The court will observe the great similarity of the statutes. Consequently the Georgia case is directly in point and supports the decision of the Supreme Court of Kansas in the case of Beeson *v.* Busenbark. But we will refer to still other States where they have similar statutes. In Texas they have a statute which reads as follows:—

> "An action for actual damages on account of injuries causing death to any person may be brought in the following cases: 1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage-coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents."
>
> Texas Rev. Statutes, Art. 2899.

In the case of Turner *v.* Cross, reported in the 18th S. W. Reporter at page 578, the question whether the representative of a party killed in the service of the receivers of a railroad was entitled to the benefit of the above statute came before the court and the court held that there could be no recovery because a receiver was not the proprietor, owner, charterer or hirer of a railroad, but was simply the agent of the court. This case is also in point in that it refused to go beyond the language of the statute to give relief to the employe of a party who was not embraced within its terms. This decision has been followed in the cases of

Yocum *v.* Self, 19 S. W. 145;
T. & P. R. R. Co. *v.* Collins, 19 S. W. 365;
H. & T. C. Ry. Co. *v.* Roberts, 19 S. W. 512;
Bonner *v.* Thomas, 20 S. W. Rep. 722, all Texas Cases.

The Supreme Court of Texas has been followed by the United States Court of Appeals for the 5th Circuit the cases of

Allen *v.* Dillingham, 60 Federal Reporter, 176.
Burke *v.* Dillingham, 60 Federal Rep. 729;

and has been approved by this court as we think in

T. & P. Ry. Co. *v.* Cox, 12 Sup. Court Rep. 905.

In Texas they also have a statute defining who are not fellow-servants, being chapter 24 of the laws of 1891. Section 1 of said act reads as follows: —

> "Be it enacted by the legislature of the State of Texas that all persons engaged in the service of any railway corporation, foreign or domestic, doing business in this State, who are intrusted by such corporation with the authority of superintendence, control or command of other persons in the employment or service of such corporation, or with the authority to direct any other employe, in the performance of any duty of such employe are vice-principals of such corporation and are not fellow-servants with such employe."

Section 2 of the same act also uses the term "railway corporation" and no other term is used anywhere in the act. The question of the application of this law to the receivers of railways was before the Supreme Court of Texas in the case of

Campbell *v.* Cook, 26 S. W. Rep. 486.

And as the language of the court is clear, forcible and very pertinent, we desire to quote the same herein at some length: —

> "The last and most important question is, does the

language of the act include receivers of railroad companies? It is clear that the words 'railway corporations' do not mean 'receivers of railway corporations.' How then is the construction to be arrived at that will embrace such receivers in the provisions of the act? Grant that the legislature intended to embrace receivers, but failed to use apt words to express that intention. Can the court import into the statute a case omitted from it by the legislature, even by accident? How can the court determine that it is not intentionally omitted? In Sutherland on Statutory Construction (section 430) it is said: 'Liberal construction is given to suppress the mischief and advance the remedy. For this purpose, as has already been said, it is a settled rule to extend the remedy as far as the words will admit, that everything may be done in virtue of the statute in advancement of the remedy that can be done consistently with any construction. Where its words are plain and clearly define its scope and limit, construction cannot extend to it; or where the language is so explicit as to exclude any reasonable inference that such extension was intended.' Lord Brougham said: 'If we depart from the plain and obvious meaning we do not construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it.' In Turner *v.* Cross, 83 Texas, 224, 18 S. W. Rep. 578, Chief Justice Stayton expressed the same rule in this clear and forcible language: '*It is the duty of a court to administer the law as it is written, and not to make the law and however harsh a statute may be, or whatever may seem to be its omission, courts cannot on such considerations, by construction restrain its operation or make it apply to cases to which it does not apply, without assuming functions that pertain solely to the legislative department of the government.*' It is unnecessary to multiply authorities upon this question. The law is valid, is expressed in plain words and must be taken and enforced by the courts according to its terms. The legislature has since amended it, but that does not affect it as applicable to this case.

> In the two sections of the statute quoted above the employer whose liability is enlarged is mentioned eight different times in various connections and each time the language used, 'railway corporations' or 'such corporations,' referring to railway corporations as used before. In no part of the act is there a word which indicates that any other than railway corporations were intended. This language cannot be so changed as to embrace an officer of the court who is in no sense a corporation, because the reasons for the law apply equally to both. To supply the word receiver in one place would answer the purpose, if that were allowable (which it is not), but it must be supplied in eight different places, and with reference to the various conditions in which the employer is related to the employe."

This is certainly an authority in point against extending the construction of such a statute so as to make receivers of railways liable when no language has been used by the legislature in creating the right imposing such liability.

In Texas they also have a statute reading as follows: —

> "Any railroad company, its officers, agents or employes, that shall refuse to deliver to the owner, agent or consignee, any freight, goods, wares and merchandise of any kind and character whatever, upon the payment or tender of payment of freight charges due as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares or merchandise to an amount equal to the amount of the freight charges for every day said freight, goods, wares and merchandise is held after payment or tender of payment of the charges due as shown by the bill of lading, to be recovered in any court of competent jurisdiction."
>
> Sayle's Civ. St. Art. 4258 A., Sec., 3.

And the question of whether the receivers of a railroad

company were liable under this statute came before the Supreme Court of Texas in the case of M., K. & T. Ry. Co. *v.* Stoner, 23 S. W. 1020, in which it was held by the Supreme Court:—

> "A receiver of a railroad is neither its officer, agent nor employe, but is the officer of the court making the appointment. We therefore think appellant was not liable for the penalty allowed."

Here again the Supreme Court refused to extend the statute to parties not embraced within its terms.

In Texas they also have a statute which reads as follows:—

> "Charges for transportation on each class or kind of freight moving in the same direction shall be uniform, and any unjust discrimination in the rates or charges for the transportation of any freight made against any person or place on any railroad operated in this State is declared to be unlawful. If any railroad corporation shall willfully charge, collect or receive from any person or persons for the transportation of any freight upon its railroad a higher or greater rate of toll or compensation than it shall charge, collect, or receive from any other person or persons for the transportation of like quantity of freight of the same class being transported from the same point in the same direction over equal distances on the same road, or if it shall charge, collect or receive from any person or persons for the use and transportation of any railroad car or cars upon its railroad a higher or greater sum than it shall charge, collect or receive from any other person or persons for the use or transportation of a car or cars of the same class for a like purpose from the same point in the same direction and an equal distance, or if any railroad shall charge one person more for transporting freight of the same class in equal or less quantities over its road for the same or a less distance than it charges another for the same or greater

distance, all such discriminating rates, charges or collections whether made directly or by means of any rebate or other shift or evasion, shall be considered and taken as prima facie evidence of extortion and unjust discrimination, which is hereby prohibited and declared unlawful, and any railroad company or companies for such violation of law shall forfeit and pay to the person or persons injured thereby the sum of five hundred dollars to be recovered before any court having jurisdiction of the amount, in any county through or into which the freight may have been transported."

Sayle's Civil Statute, Art. 4258 B, Section 7.

The question of the liability of the receivers operating a railroad in the State of Texas for the violation of the above statute came before the Supreme Court in the case of Bonner *v.* Franklin Co-operative Association, 23 S. W. 317, in which the Supreme Court said: —

"The penalty prescribed by the statute referred to is denounced against and limited to 'railroad companies.' The doctrine announced in the case of Turner *v.* Cross, 83 Texas, 218, is decisive of this case, and following that case it must be held that receivers operating a railroad under judicial appointment are not 'railroad companies' within the purview of the statute under which it is sought to maintain this action. Furthermore, this being an action to recover a statutory penalty, a stricter rule of construction applies, and unless the language of the statute is broad enough to include railroad receivers, they are not liable to its penalty."

This decision was followed by the Supreme Court of Texas in the cases of:—

T. & P. Ry. Co. *v.* Barnhart, 23 S. W. Rep. 801;
Campbell *v.* Wiess, 25 S. W. 1076.

And the Supreme Court of that State held that a statute could not be extended by judicial construction.

Schloss *v.* Railroad Company, 85 Texas, 601.

In South Carolina they have a statute, being Sec. 1511 of its Code, which reads as follows:—

> "Every railroad corporation shall be responsible in damages to any person or corporation whose building or other property may be injured by fire communicated by its locomotive engines, etc.

And the question of whether a corporation not owning the engine which set out the fire could be made liable under that statute came before the Supreme Court of that State in the case of Hunter *v.* Columbia N. & L. R. R. Co., 19 S. E. 197, in which the Supreme Court says:—

> "This statute, as we have seen, has been construed to mean that all questions of negligence are eliminated from any case arising under its provisions. This statute therefore creates a special and exceptional liability upon every railroad company for any damage done to the property of another by fire communicated by its locomotive engines, irrespective of any negligence on its part. The statute therefore must be strictly construed and applied only to those whom it covers. It certainly does not in express terms cover any other railroad company than the one which owns the locomotive from which the fire may be communicated, as is evidenced by the use of the words, 'its locomotive engine,' and neither was anything in the section from which it may be justly inferred that the intention was to embrace any other company."

Whenever statutes which create a liability unknown to the common law — a special and exceptional liability — come before the courts they are strictly construed with-

out exception, and there is no rule nor even license to be found within the books that will permit a court to extend the operation of the statute under consideration to parties not within its express terms.

Under this statute the defendant in error cannot recover unless he is an employe of a railroad company organized in the State or doing business in the State. This is the language of the statute. It is explicit, definite and certain; no room for uncertainty; no possible opportunity for ambiguity or doubt. There is no pretense that the statute shall apply to all who may be engaged in the dangerous business of operating railroads. In the case of Beeson *v.* Busenbark the Kansas Supreme Court said on page 674 of its opinion:—

> "In various opinions of this court we have frequently held that the statute applied to persons engaged in the hazardous work of operating trains upon a railroad; but in all these cases we had reference to the employes of a railroad company organized in this State, or of a railroad company doing business in this State."

The defendant in error contends and the argument will be made to this court that the statute was intended for the benefit of all who should be in the dangerous business or employment incident to work upon railroads, but it can readily be seen that the statute will not bear any such construction without doing violence to the language used. It would be competent for the legislature to have extended the statute, as is said in the case of Beeson *v.* Busenbark, but it has not done so notwithstanding the fact that at the time of the passage of this statute there was at least one, if not two, railroads within the State in the hands of receivers and the legislature had before it the statutes of other States upon this same subject, some of which made receivers liable while others did not. There has always

been in Kansas a disposition to make a discrimination against railroad companies in regard to their liability, not only to employes but to the general public. In the decision of the case of Beeson *v.* Busenbark the court followed the well settled rule of law laid down in the text-books and decisions of courts generally upon the construction of statutes. Mr. Sutherland in his work on Statutory Constructions, section 217, says: —

> "The law will not allow the revocation or alteration of a statute by construction, when the words may have their proper operation without it."

Give the words of this statute the proper operation without any attempt at construction, and the liability is confined entirely to railway companies organized in the State and doing business in the State. And it is a general rule that we must look for the intent of the legislature in passing a statute, first, to the language of the statute itself, and if the language is plain and free from ambiguity and doubt, no other means of interpretation is allowable. We again quote from Mr. Sutherland in support of this proposition, as follows, Sec. 237: —

> "It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power and seek for that intent in every legitimate way; but *first of all in the words and language employed;* and if the words are free from ambiguity and doubt and *express plainly, clearly and distinctly the sense of the framers of the instrument*, there is no occasion to resort to other means of interpretation. The statute itself furnishes the best means of its own exposition."

Mr. Sedgwick in his work on Statutory and Constitutional Law, at page 227, lays down the same rule in a single sentence, as follows:—

> "It is not allowable to interpret what has no need of interpretation."

And in case of Fitzpatrick *v.* Gebhart, 7 Ks. 35, the Supreme Court of Kansas laid down the same rule in almost the exact language of the text-writers above quoted. To go further and interpolate something into the statute to carry out what might be supposed to be the intention of the legislature would be an assumption of legislative power on the part of the court which is strictly forbidden by the well settled rules of statutory construction.

In the case of Tompkins *v.* First National Bank, reported in 18 N. Y. S., page 234, it was said: —

> "A court has no authority to extend a law beyond the fair and reasonable meaning of its terms because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning."

In view of these authorities, for the court to attempt to extend the terms of the statute to cover receivers would be an unwarranted assumption of power, even though this court might be convinced that the legislature intended to embrace all who were engaged in the dangerous business of operating trains upon railroads; yet they would not be warranted in interpolating the word "receivers" into this statute because of the fact that it supposed the legislature so intended, and did not use proper words to carry out its intent or policy. This court cannot depart from the plain language used by the legislature. In the case of Newell University Mill Company *v.* Muxlow, 21 N. E. Rep. 1848, same case in 115 N. Y., page 170, the Court of Appeals of New York said: —

> "A departure from the language of an unambigu-

ous statement is not justified by any rule of construction and is an exercise of legislative power."

The terms of the statute being plain, certain and unambiguous, do not call for, require or admit of a resort to construction. The parties affected by the statute are railroad companies organized in the State, or doing business in the State, and the employes of such companies, and only the parties designated in the statute are affected by it.

McClusky *v.* Cromwell, 11 N. Y. 593;
State ex rel. *v.* Brewster, 42 N. J. L. 125;
Benton *v.* Wickwire, 54 N. Y. 226;
Douglass *v.* Chosen Freeholders, etc., 38 N. J. L. 214;
Arthur *v.* Morrison, 96 U. S. 108;
Ruggles *v.* Illinois, 108 U. S. 526;
Detroit *v.* Putnam, 45 Mich. 263;
Detroit *v.* Chaffee, 70 Mich. 80.

The court cannot consider consequences, nor can it go outside of the statute or by conjecture, restrict or extend the meaning thereof.

Sutherland on Statutory Construction, sections 237 and 238;
Coffin *v.* Rich, 45 Maine, 507;
Salling *v.* McKinney, 1 Leigh (Va.), 32;
The Samuel E. Spring, 27 Federal Reporter, 764;
Johnson *v.* H. R. R. Co., 49 N. Y. 455;
United States *v.* Hartwell, 6 Wallace, 395;
Denn *v.* Reid, 10 Peters, 524.

Policy, necessity or expediency are not to be considered by the court in construing or interpreting a statute; it has nothing to do with the wisdom or sound policy of the

statute, nor have the courts any dispensing power over statutes:—

Coulter *v.* Robinson, 24 Miss. 278;
Belleville Railroad Co. *v.* Gregory, 15 Ill. 20 and 27;
Repley *v.* State, 4 Indiana, 264.

Therefore the language of the statute in question being plain and unambiguous, the courts have no duty to perform but to enforce the law according to its terms and leave changes to the legislature:—

Rosenplaenter *v.* Roessel, 54 N. Y. 262;
Woodbury *v.* Berry, 18 O. S. 456;
Douglass *v.* Chosen Freeholders, 38 N. J. L. 214.

The statute in question must be strictly construed and the court has no power to extend its terms, not only because the statute is plain and unambiguous so that a resort to construction will not be permitted, but also because it creates rights and liabilities not existing in Kansas prior to its passage. It gives to employes of railroad companies organized in the State, or doing business in the State, a right of action where none existed at common law, and it gives this right of action to no other employes although engaged in the same dangerous business of operating trains upon railroads. It does not give to employes in the same line of business, not working for railroad companies organized or doing business in the State, such right of action. Hence, the law has a restricted and not a general operation upon all employes engaged in the same business. It does not make individuals or co-partnerships liable thereunder, but only railroad companies organized in the State and doing business in the State. It is therefore not a statute of a general nature, but partakes of the nature of a special law creating a special and exceptional liability which

was not only not recognized by the common law, but was repudiated as unwise and unjust, and such statutes are always strictly construed.

Beeson *v.* Busenbark, *supra;*
Sutherland on Statutory Construction, sections 371 and 398;
Chicago and N. E. Ry. Co. *v.* Sturgis, 7 N. W. 213;
Steamboat *v.* Stunt, 10 O. S. 583;
In re Hollister Bank, 27 N. Y. 393;
Mayer *v.* Penn Slate Co., 71 Pa. State, 293;
Lane's App., 105 Pa. State, 49;
Pell *v.* Ullmar, 18 N. Y. 139;
Van Valkenburg *v.* Torrey, 7 Cowen, 252;
Beecher *v.* Baldy, 7 Mich. 488;
Dyson *v.* Sheley, 11 Mich. 527;
Itawamba *v.* Chandler, 62 Miss. 193;
Barrett *v.* Dolan, 130 Mass. 366;
Hemmingway *v.* Scales, 97 American Decisions, 425;
Tinsman *v.* Belvidere R. R. Co., 69 American Decisions, 565.

Where a servant of receivers has been injured in the State of Kansas through the negligence of a co-servant he cannot recover, because the statute does not in terms make receivers liable nor does it in terms make the property of the corporation liable, but only the corporation itself when the injured party is its employe. The plaintiff in this case not being the employe of the railroad company, but of the receivers, can neither look to the receivers nor to the property of the corporation. His injury was the result of one of the risks which he assumed in taking service with the receivers. He did it knowing that the receivers were not liable in case he should be injured through the negligence of a co-servant. He could have entered the employ of a

railroad corporation and have had the benefit of this statute, but his employment under the receivers seems to have been voluntary. The only possible theory upon which defendant in error could make the property liable would be that the receivers were in some manner the agents or employes of the corporation, but it is well settled that the receivers are not the agents of the corporation. See the Texas cases, particularly Turner *v.* Cross, *supra*, and in addition thereto the following cases:—

T. & P. R. R. Co. *v.* Geiger, 15 S. W. 214;
Beech on Receivers, Sections 1 and 2;
Warren *v.* Brown, 14 S. W. 1032;
Vermont & Canada Ry. Co. *v.* Vermont Central Railway Co., 46 Vermont, 792;
Ellis *v.* Boston, etc., Ry. Co., 107 Mass. 28;
Fosdick *v.* Schell, 99 U. S. 251;
Metz *v.* Buffalo, etc., R. R. Co., 58 N. Y. 61;
Kenny *v.* Home Ins. Co., 71 N. Y. 396;
Day *v.* Telegraph Co., 66 Md. 354;
Attorney-General *v.* Ins. Co., 89 N. Y. 94;
Railroad Company *v.* Strinfellow, 43 Ark. 322;
High on Receivers, Section 396;
Pierce on Railroads, 285.

That the corporation is not bound by the negligence or mismanagement of the receivers, see the following authorities:—

O. & M. Ry. Company *v.* Davis, 23 Ind. 553;
Sloan *v.* Central Iowa R. R. Company, 62 Iowa, 728;
Davis *v.* Duncan, 19 Fed. 477.

We contend that the language of the statute only makes the railroad company liable and not its receiv-

ers franchises or its property. No power is vested in the court to go farther than the statute warrants. Whatever might be said as to the reason for the law or what the law should be, it is a question with which the court has nothing to do, for its power and duty are confined entirely to ascertaining what the law is, not what it should be. As to whether this statute should be extended so as to cover receivers, or others who may be engaged in operating railroads, the legislature is to be the sole judge; and every presumption exists that the legislature used proper words to clearly express its intention as to the scope and effect that the statute should have.

A strong argument in support of our construction of the statute is found in the history of its enactment by the Kansas legislature. It was taken from the Iowa statutes, and it is a well settled principle,

IV.

Where one State adopts a law passed by the legislature of another State the judicial construction given to the statute in the State where it originated follows to the State of its adoption.

This principle has repeatedly been announced by the Supreme Court of Kansas, and specially with reference to this particular statute by Chief Justice Horton in the case of

Mo. Pacific Ry. Co. *v.* Haley, Administrator, 25 Kan. 35,

in which case the constitutionality of the law was attacked. Judge Horton, in the opinion of the court, pointed to the fact that this statute was taken from the law of Iowa enacted in 1862 by the legislature of that State, and that all objections to its constitutionality had been settled by the Supreme Court of Iowa, and that Kansas had taken the law from that State with the same construction which the

courts of that State had given it. There are also other decisions of the Supreme Court of Kansas on this proposition and we refer to the cases of

A. T. & S. F. Ry. Co. *v.* John Franklin, 23 Kansas, 74;

Bemis *v.* Becker and others, 1 Kansas, 226;

Stebbins *v.* Guthrie, 4 Kansas, 353, the precise point being decided on page 364.

The statute in question at the time it was adopted by the legislature of Kansas was the same as Sec. 1307 of the statutes of Iowa, and the legislature of that State evidently thought that the language of the act, which was exactly like the language of the section of the Kansas statute which we have quoted, was not broad enough to cover receivers or other individuals who might be engaged in the operation of railroads, and therefore, it passed another section which is known as Section 1278 of the Iowa statutes, and which section, without quoting all of its terms, makes Section 1307 applicable to all

"companies, partnerships, assignees and lessees of railroad companies or *other persons* whatsoever operating railroads."

Under and by virtue of this last section the Supreme Court of Iowa has held in the case of

Sloan *v.* Central Iowa Ry. Co., 16 N. W. Reporter, 331,

that a receiver was liable to the same extent and in the same manner as a railway company would be liable for the injury to an employe. In the case of

Brockert *v.* Central Iowa Ry. Co., 47 N. W. Reporter, 1026,

a receiver was held liable for killing stock by virtue of this same section of the statute.

There is no decision by the Supreme Court of Iowa where the language of Section 1307 was construed to mean any other than railway companies. Whenever the question has arisen and a receiver has been held liable under the laws of Iowa it has always been by virtue of Section 1278 of the Iowa statute and not by virtue of the terms of Section 1307 thereof. So, it is fair to presume that when the legislature of Kansas adopted the fellow-servant law from the statute of Iowa, it knew of the existence of the other section of the Iowa statutes but did not desire to adopt it and thereby make the law applicable to all who might be operating railroads, but intended the law to apply to railroad companies only. Not only is this apparent from the fact that the legislature of Kansas only adopted a portion of the statute of Iowa, but it is evident from the history of the Kansas act. It was passed in 1874. It is a law in and of itself and is entitled,

> "An act to define the liability of railroad companies in certain cases."

Section 1, which we have quoted is all there is of the act except Section 2, which provides when the law shall take effect. It is found on page 143 of the session laws of Kansas of 1874, and Section 1 is incorporated in the General Statutes of Kansas, 1889, and is known as Section 1251. At the very same session of the legislature of Kansas, on the very same page of the laws of 1874, and in fact the very next bill passed by the legislature was an act entitled,

"An act relating to killing or wounding stock by railroads."

Section 1 of this last act, reads as follows:—

> "Every railway company or corporation in this State, and every *assignee or lessee* of such company or corporation, shall be liable to pay the owner the full value of each, and (and) every animal killed, and all damages to each and every animal wounded by the engine or cars on such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or *assignee or lessee* thereof, or not."

This is Section 1252 of the General Statutes of Kansas of 1889.

Now, it will be noticed in Section 1251 the terms used are, "railroad companies," and no others. In the very first section of the next act, passed at the same session, in regard to the killing and wounding of stock, the language employed is,

> "that every railroad company or corporation and every *assignee or lessee* of such railroad company or corporation in this State shall be liable, etc."

Now, if the terms, "railroad company," as used by the legislature in Section 1251, are broad enough to embrace receivers, why were they not broad enough to embrace the "assignee or lessee of such railroad company or corporation," when the legislature passed Section 1252, which was passed on the same day and was the very next bill passed? The very fact that the legislature, in passing Section 1251, used the terms, "railroad company," and no other term is used, shows clearly that it did not intend Section 1251 to extend to assignees or lessees of "railway companies or corporations," nor, is there any section of the Kansas statutes or principle of law that will extend the

liability to the assignees or lessees, or receivers of railway corporations. That the legislature knew the terms, "railway company," could not be extended to mean anything else than a railway corporation, and for that reason when it came to the passage of the very next act, to wit: Section 1252 of the General Statutes of 1889, it extended the liability under that section to the *assignees or lessees* of railway companies or corporations. This shows conclusively to the thinking mind that the legislature knew what it was about, and had an intelligent understanding that the terms, "railway company," meant exactly what the words implied and nothing more, and it was not the intention of the legislature to extend the liability any further than what it understood the words used would naturally imply, to wit: "railroad companies doing business in the State." If the terms, "railroad company," can be construed to mean receivers of railways by any process of reasoning, then the act can be construed to mean assignees and lessees as well, and could be construed to mean contractors, construction companies, partnerships, or any and all persons who may undertake the dangerous business of railroading. If the terms, "railroad companies," by any judicial construction can be made to embrace receivers of railways then the entire logic and reasoning of Chief Justice Horton in the case of

Beeson *v.* Busenbark, *supra*,

is wrong, because the reason for extending the meaning of the terms, "railroad companies," existed as strongly in that case as in any case that can be presented.

The legislative construction which we say was given this section of the statute by the legislature of Iowa, is as binding upon the Supreme Court of Kansas, as would be a decision of the Supreme Court of Iowa construing it; and

taking it and incorporating it into the statutes of Kansas by the legislature thereof, was to adopt such legislative construction, and such construction could not properly be ignored by the Supreme Court.

Philadelphia & Erie R. R. Co. *v.* Catawissa, 53 Penna. St. 20.

The final proposition made by opposing counsel is that the Supreme Court of Kansas has, since the institution of this case, and since the Circuit Court of Appeals rendered its decision, decided in the case of Harry *v.* Rouse, receiver (and which case is now before this court on writ of error) that receivers of railways are liable under the Kansas fellow-servant statute. We challenge the correctness of that decision as we do the decision of the Circuit Court of Appeals in the case at bar, and we submit the decision of the Supreme Court of Kansas in Harry *v.* Rouse, is in direct conflict with Beeson *v.* Busenbark and not controlling in this court for that and other reasons.

V.

The Federal courts are not bound by the decision of the highest court of a State construing a State statute affecting the liability of a receiver appointed by a Federal court.

This must necessarily be so, in a case like the one at bar, where the ultimate right to determine the liability of the receiver is vested in the Federal court, and the State court cannot construe or determine his liability except by virtue of Federal authority as expressed in the act of Congress of March 3d, 1887, or special permission of the Federal court appointing the receiver. In either case the decision

of the State court is not final, but the right is given by the constitution of the United States to have the question of liability reviewed in this court; and to say that the State court can construe a statute of the State and the liability of a Federal receiver thereunder, and that its decision is final, is to deprive Federal courts of all power and authority to determine the ultimate liability of its receiver under the Federal act of 1887. In such a case the decision of the State court is not the decision of the court of final resort, but is the decision of an inferior court, for as to all questions arising under the constitution and laws of the United States the State court is simply an inferior court. The fact that the case is one arising under the constitution and laws of the United States, does not, in and of itself, deprive the State court of jurisdiction to try and determine the cause of action; but its judgment is subject to review by this court, and consequently, the decision of the highest court in a State is simply the decision of an inferior court. Where this court has jurisdiction to review the decision of the State court affecting the liability of a Federal receiver, or any decision of the State court that can properly be reviewed by this court, then this court will determine the liability according to its ideas and judgment affecting the general liability, or according to the general principles of law. It has been repeatedly decided that as to the questions of general law this court is not bound by the decision of the State court. We call the Court's attention to:—

Railroad Company *v.* Baugh, 149 U. S. 368;
Gardiner *v.* Michigan Central R. R. Co., 150 U. S. 349, and cases therein cited.

Especially is this so with reference to a local statute where the State court has not construed it or where the

decisions of the State court construing it are conflicting or rendered since the cause of action before this court arose. We desire to call the court's attention to the case of

Burgess *v.* Seligman, 107 United States, 20,

and from this decision we desire to quote what this court, speaking through Mr. Justice Bradley, says upon this question: —

> "But the appellant's counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case, and on the very transactions which we are now considering. That court, since the determination of this case by the Circuit Court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed. The first case was that of *Griswold* v. *Seligman*, decided in November, 1880; the other, that of *Fisher* v. *Seligman*, decided in February, 1882, in which the former case was substantially followed and confirmed. The case of *Griswold* v. *Seligman* seems to have been very fully and carefully considered. We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority.
>
> We do not consider ourselves bound to follow the decisions of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of the laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous

and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State courts themselves as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when the contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

In the case at bar it is contended by the defendant in error that he is entitled to recover only under and by virtue of the Kansas statute which we have been discussing.

We contend that in

Beeson *v.* Busenbark, 44 Kansas, 669,

the Supreme Court of Kansas construed this statute by limiting the right to recover to employes of railway companies and refused to extend such liability by construction to others than railway companies.

The defendant in error claims that since the injuries complained of by him in this case were sustained, the Supreme Court of Kansas in case of Harry *v.* Rouse has again construed this same statute under which he claims the

right to recover, and construed it entirely different, in fact, practically reversing the case of Beeson *v.* Busenbark.

If these respective contentions be correct, then there is no settled law of the State construing the statute under which the defendant in error claims his right to recover in this case. There are two decisions construing the same statute and they are diametrically opposed, are inconsistent with each other and cannot possibly be reconciled. Such is the present state of the decisions in Kansas. Our contention is that the case of

Beeson *v.* Busenbark

is the sound interpretation of the law with reference to the proper construction of this statute and that the latter case of

Rouse, Receiver, *v.* Harry,

referred to by the defendant in error, is an innovation and contrary to the long settled construction of this statute by the same court, and this court is free to exercise its own judgment in construing this statute,

Burgess *v.* Seligman, *supra.*

Before Harry *v.* Rouse can be considered as an authority, the writ of error bringing it to this court will have to be considered and passed upon by this court.

We contend that the motion to dismiss should be overruled, and the question of affirmance should not be entertained by the court until the entire record is before it; for by the assignment of errors it is apparent that other questions of serious import are in the case, than those disclosed by the portion of the record now printed. It is claimed that the amount of damages allowed is excessive, and we

have assigned error upon that ground, and there are other grounds upon which we have assigned error, but the complete record is not yet printed. We therefore respectfully submit that with the overruling of the motion to dismiss, the further consideration of the case should be deferred until the full record is printed and the case comes up in its regular order for hearing upon the merits.

JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

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JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

161 U.S. 588

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Office Supreme Court, U. S.
FILED.
MAY 4 1896
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CLERK.

161-588

IN THE

Supreme Court of the United States.

HENRY C. ROUSE, RECEIVER DE BONIS NON, MISSOURI, KANSAS & TEXAS RAILWAY,
PLAINTIFF IN ERROR AND PETITIONER,

vs.

JOHN E. HORNSBY.

997

Petition of Henry C. Rouse, Receiver, etc, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

JAMES HAGERMAN,
T. N. SEDGWICK,
BRITTON & GRAY,
Attorneys for Petitioner.

Nixon-Jones Printing Co., 215 Pine St., St. Louis, Mo.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

H. C. ROUSE, Receiver, etc.,
Plaintiff in Error,

vs.

JOHN E. HORNSBY,
Defendant in Error.

To John E. Hornsby, or Nelson Case, his Attorney of Record:

You are hereby notified that Henry C. Rouse, Receiver, etc., plaintiff in error, in case of Rouse, Receiver, against Hornsby, will on Monday, May 4th, 1896, or as soon thereafter as he can be heard, apply to the Supreme Court of the United States for a stay of mandate in said case until Monday, May 11th, 1896, to enable plaintiff in error to present to said court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, under section six, of the act of Congress of March 3d, 1891, entitled, "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

And you are further notified that on said Monday, May 4th, 1896, this plaintiff in error will file his petition for such writ of certiorari.

JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

I hereby acknowledge service of a copy of the above notice, this, the 30th day of April, A. D. 1896.

NELSON CASE,
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

HENRY C. ROUSE, RECEIVER DE BONIS NON, MISSOURI, KANSAS & TEXAS RAILWAY,
PLAINTIFF IN ERROR AND PETITIONER,

vs.

JOHN E. HORNSBY.

Petition of Henry C. Rouse, Receiver, etc., for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Supreme Court of the United States:

The petition of Henry C. Rouse, Receiver, *de bonis non*, Missouri, Kansas & Texas Railway, respectfully shows to this honorable court:—

1. He is the Receiver of the Missouri, Kansas & Texas Railway, duly appointed by the United States Circuit Court of Kansas and other United States courts having

ancillary jurisdiction of said railway, vice Geo. A. Eddy and H. C. Cross, deceased, theretofore Receivers of said railway by appointment of said United States Circuit Court for the district of Kansas in the cause then and therein pending between the Mercantile Trust Company, a corporation and citizen of the State of New York as complainant, and the Missouri, Kansas & Texas Railway Company, a corporation and citizen of the State of Kansas, wherein the complainant sought to foreclose a mortgage given to it as trustee, by said railway company.

2. Eddy and Cross as such Receivers took possession of said railway in Kansas and elsewhere on *November* 1st, 1888, and as such Receivers were managing said railway and running and operating trains thereon on the *3d* day of *June*, 1891, on which date they had in their employ as a baggageman on one of their passenger trains, John E. Hornsby, the defendant in error in the above entitled cause.

3. On said 3d day of June, 1891, one of said Receivers' passenger trains, and on which the said Hornsby was at the time baggageman, collided with a freight train locomotive of said Receivers near Hartford in the State of Kansas, through and solely by reason of the negligence of fellow-servants.

4. Hornsby sustained serious personal injuries by reason of such collision, and on the 15th day of December, 1891, filed his intervening petition in the said cause of the Mercantile Trust Company *v.* Missouri, Kansas and Texas Railway Company, seeking to recover $26,120.00 damages.

5. To this petition said Receivers filed a general demurrer, which was by the court sustained, and Hornsby

took the case to the United States Circuit Court of Appeals for the Eighth Circuit (56 Fed. Rep. 461; 5 C. C. A. 560; 12 U. S. A. 404), where the cause was reversed and remanded, with directions to overrule the demurrer.

A copy of this opinion is hereto appended, marked "Exhibit A."

6. A trial was had before court and jury, and at the close of the evidence the Receivers requested the court to give to the jury the following special instruction:—

No. 1. Gentlemen of the Jury: The court instructs you that this action is brought under section 1251 of the General Statutes of Kansas, which reads as follows:—

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes to any person sustaining such damage."

"And as this statute applies only to railroad companies organized or doing business in the State, and the employes of such companies, and does not apply to an individual, or individuals who may be operating railroads nor to the employes of such individual or individuals, and as the Receivers, the defendants in this action, are not within the terms of the statute, and as the intervener was an employe of the Receivers and not an employe of the railroad company, and as the party of whose acts he complains was also an employe of said Receivers, defendants in this cause, and a fellow-servant or a co-employe of the intervener, the said intervener is not entitled to the benefit of said statute, and, therefore, your verdict must be for the defendants."

Which said instruction the court refused to give and to the action of said court, in refusing to give said instruc-

tion, the said Receivers at the time duly excepted and except; and the court gave no instruction or instructions of similar import or embracing the same proposition, but instructed the jury directly to the converse thereof.

The case was submitted to the jury and a verdict returned against Receivers for $15,000.00 and judgment was entered accordingly.

7. The Receivers took the case to the United States Circuit Court of Appeals for the Eighth Circuit, where the judgment was affirmed (67 Fed. Rep. 219).

A copy of this opinion is hereto appended, marked "Exhibit B."

8. Before the case was submitted to the United States Circuit Court of Appeals on the second appeal, the Receivers filed a motion asking that court to certify to this court the controlling question in the case, as provided by Sec. 6 of the act of March 3, 1891, which said motion was as follows:—

In the United States Circuit Court of Appeals for the Eighth Circuit.

Henry C. Rouse, Receiver de bonis non,
Appellant and Plaintiff in Error,

vs.

John E. Hornsby, Intervener,
Appellee and Defendant in Error.

MOTION TO CERTIFY QUESTION TO THE SUPREME COURT.

Comes now the plaintiff in error in the above cause and moves the court to certify to the Supreme Court the question in this case:—

Are the receivers of a railroad company, appointed by a Circuit Court of the United States for the District of Kansas, and by virtue of such appointment in the control and operation of the property of a railroad company having a line through the State of Kansas, liable in damages to a servant who is injured while in performance of his duty as such servant in said State of Kansas, by or through the negligence of a co-servant, where the only change in the common law rule of liability to servants for such injuries is the following statute of the State of Kansas passed by the legislature in 1874, to wit:—

Chapter 93, Sec. 1, Laws of 1874.

Section 1. "Every railroad company organized or doing "business in this State shall be liable for all damages done "to any employe of such company in consequence of any "negligence of its agents, or by any mismanagement of "its engineers or other employes, to any person sustaining "such damage."

The reasons for this motion are that the question presented is a very important one, as at least two of the largest systems of railroad in the west are now in the hands of receivers, appointed by the Circuit Court of the United States, and both systems have lines of road into and through the State of Kansas and there are also other lines of road not so extensive but in the same State and now controlled and operated by receivers appointed by the Federal court; and the receivers of all these corporations deny any liability under the above statute and insist that they are only liable to a servant for injuries where the negligence causing the injury was that of a master or vice-principal, and claims are constantly arising making it important, in fact necessary, that the question be finally determined as soon as possible; and for a further reason that this court has already passed upon the question, an-

swering it affirmatively, and the question is again presented in this case and while not controlling, is a very important question therein, and the other questions presented are of no consequence or importance outside of this case.

And still another reason is that this case is not one where the decision of this court is final, but an appeal may be taken to the Supreme Court of the United States under Sec. 6 of the act of March 3d, 1891, and the question will not be regarded as finally settled until passed upon by that court; and the defendant in error has filed in this court a motion to strike from the record of this cause all reference to this question in this cause upon the ground of *res adjudicata*, notwithstanding the fact that the former decision of the question by this court was not a final judgment.

T. N. Sedgwick,
Attorney for Appellant
and Plaintiff in Error.

The Court of Appeals denied this motion for the express reason that a writ of error would lie from their decision of the case on its merits to this court, but this court has since dismissed Receivers' appeal for want of jurisdiction. (Rouse *v.* Hornsby, 161 U. S. —.)

9. Failing to get this case before this honorable court either by certification by the Court of Appeals or by writ of error from its decision, a writ of certiorari is now asked for the reason that the Court of Appeals has erroneously decided that receivers of railways appointed by Federal courts are liable in damages to their employes for injuries received solely through the negligence of fellow-servants under said provision of the Kansas statutes, in that said provision, neither by its words nor intention, applies to individuals or Receivers operating a railway, when rightly construed and

as construed by the Supreme Court of the State of Kansas in the case of

Beeson *v.* Busenbark, 44 Kan. 669.

A copy of this decision is hereto appended, marked "Exhibit C."

10. In the case of Rouse, Receiver *v.* Harry, 40 Pac. Rep. 1009, the Supreme Court of Kansas overruled its former decision in *Beeson* v. *Busenbark* and held that Receivers were liable under the said statute, and virtually adopted the opinion of the United States Court of Appeals of which your petitioner now complains. Beeson *v.* Busenbark at the time Hornsby, plaintiff below, was injured, as well as at the time he brought his suit and at the time the Court of Appeals rendered its final decision herein, had neither been modified, criticised or overruled by the Supreme Court of Kansas, but on the contrary gave the right and settled construction of the Kansas statute. Moreover the decision of the Supreme Court of Kansas in the *Harry case* is not final or authoritative, being before this court now on writ of error.

The effect of the decision in the *Harry case* is to give a cause of action against your petitioner, when, by the settled law of Kansas at the time the accident happened, none existed. It is tantamount to a retroactive statute, and such a statute would be violative of your petitioner's constitutional rights in that no State can change vested rights of defense or enact a law impairing the obligations of contracts.

A copy of this decision is hereto appended, marked "Exhibit D."

11. The United States Circuit Court of Appeals for the Fifth Circuit has construed a very similar statute of Texas as not applying to receivers. (Allen *v.* Dillingham, 60 Fed. Rep. 176; Burke *v.* Dillingham, *Id.* 729).

12. Similar statutes in other States have been uniformly construed by the highest courts of such States as not applying to Receivers of railways.

Henderson *v.* Walker, 55 Ga. 481;
Thurman *v.* Cherokee Railroad Co., 56 Ga. 376;
Turner *v.* Cross (Tex.), 18 S. W. Rep. 578;
Railway Company *v.* Collins (Tex.), 19 S. W. 365;
Hunter *v.* Columbia R. R. (S. Car.), 19 S. E. Rep. 197.

13. This court in the case of

Texas & P. Ry. Co. *v.* Cox, 145 U. S. 593,

followed the Supreme Court of Texas in *Turner* v. *Cross* and *Railway Company* v. *Collins*, *supra*, in holding that the statute of that State giving a cause of action against the "proprietor, owner, charterer or hirer" of a railroad for injuries resulting in death did not apply to Receivers of railways.

14. The Circuit Court of Appeals in this case erroneously construed section 2 of the act of Congress of Aug. 13, 1888; 25 Stat. 433, as giving a cause of action against Receivers of railways for injuries received through the negligence of fellow-servants, if, under the law of the State where the injuries were received, the railway company itself would have been liable had it been operating its road.

15. Your petitioner refers to and makes a part hereof, the printed abstract of record in this case, filed by the plaintiff below and on which his motion to dismiss the writ of error for want of jurisdiction was founded, and which sets forth substantially the parts of the transcript of record necessary to a determination of this petition. From this printed record it appears that the decision of the United States Circuit Court and the decisions of the Circuit Court of Appeals adverse to your petitioner, were based on the proposition that though the plaintiff below was injured through the negligence of fellow-servants, yet the statute of Kansas made the receivers liable for such injuries. By this construction we contend the statute was misread and construed to have a different meaning than the one it plainly imports. These rulings we claim to be in direct conflict with the prior and then undisturbed decision of the Supreme Court of Kansas, in conflict with the decisions of the Supreme Courts of other States ~~or~~ and kindred statutes; in conflict with the Circuit Court of Appeals for the Fifth Circuit, and in conflict with this court as herein shown.

In view of these conflicts of authority this case is peculiarly one which should be determined by this court and the true construction of this statute authoritatively settled.

Wherefore, and inasmuch as your petitioner is about to be subjected to the payment of a wrongful judgment, and is otherwise remediless in the premises, may it please your honors that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court, on a day certain, to be therein specifically named, a full and complete transcript of the record and all the proceedings of said Circuit Court of Appeals in the case therein entitled

Henry C. Rouse, Receiver de bonis non Missouri, Kansas & Texas Railway,

vs.

John E. Hornsby,

to the end that said case may be reviewed and determined by this court as provided by section 6 of the act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem meet and proper under said act, and that the said judgment of the United States Circuit Court of Appeals in said cause be reversed.

And your petitioner will ever pray, etc.

JAMES HAGERMAN,
T. N. SEDGWICK,
BRITTON & GRAY,
Attorneys for Petitioner.

"EXHIBIT A."

HORNSBY *v.* EDDY.

Circuit Court of Appeals, Eighth Circuit.

(May 29, 1893.)

Before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge.

THAYER, District Judge: The sole question presented by the record in this case is whether, under the laws of Kansas, a railway employe who is injured by the carelessness of a fellow employe, while at work in the line of his duty on a railroad that is at the time in the hands of a receiver, may have an allowance against the property of the railway company, that is in the custody of the receiver, for the injuries so sustained. The statute under which this question arises was enacted in Kansas in 1874, and is as follows:—

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage." 1 Gen. St. Kan. 1889, par. 1251.

It is clear that, with respect to persons employed by a railway company as railway operatives, the statute last above quoted changes the rule of the common law that the master is not liable to a servant for an injury sustained in consequence of the negligence of a fellow-servant. Does the fact that a receiver is appointed to temporarily operate a railroad, forthwith alter the status of all its employes,

and re-establish as to them the old rule of the common law, so long as the receiver remains in charge? Viewing the question in the light of those considerations of public policy, which probably gave birth to the statute, we cannot conceive of any reason why the appointment of a receiver should have such effect. It is a fact of which we may well take judicial notice that great railway systems, which employ thousands of men, are frequently operated for a term of years through the agency of a receiver. Such receivers do not, as a general rule, change the working force of the road, or the rules and regulations by which trains are run or by which the other business of the road is transacted. The men whom they employ are engaged in the same quasi-public service as other railway employes, and daily encounter the same risks and hazards. Furthermore, the receiver of a railroad operates it for the immediate benefit of the company by which it is owned, in that he discharges all of the public duties of the corporation, and appropriates the income of its road to the preservation of its property and franchises, and to the payment of its debts. In view of the fact that many railroads have been operated for years by receivers, and the manner in which it is customary to operate them, Congress has recently recognized both the justice and the expedience of placing such receivers on a plane with railway corporations, by declaring in explicit language —

"That whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof; * * * and that every receiver or manager of any

property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." 24 Stat. 554; Eddy *v.* La Fayette, 49 Fed. Rep. 807–809, 1 C. C. A. 441.

These general considerations warrant the conclusion that, if the rules of the common law are modified for the benefit of the employes of railway companies, either because of the extraordinary dangers to which they are exposed, or the quasi-public nature of the service in which they are engaged, or for any other reason, then, for like reasons, the old rule of the common law should not be held applicable to the employes of a receiver who is engaged in operating a railroad; and we can scarcely conceive that any legislative body would intentionally make any distinction between the two classes of employes last referred to.

It is said, however, that the Kansas statute above cited is in derogation of the common law, and for that reason must be strictly construed. But the statute is also a remedial statute, and, being of that nature, the plaintiff in error is entitled to invoke an interpretation that will give effect to the intention of the lawmaker. At all events, a construction ought not to be adopted which merely clings to the letter, and ignores the obvious spirit and purpose, of the enactment.

It is furthermore contended by the defendants in error that the statute in question has been construed by the Supreme Court of Kansas, and that it has been held to be inapplicable to persons in the railway service when the road on which they are employed is in charge of a receiver. With respect to this contention, we must concede that, the question before us being one of statutory construction, we are bound to follow the construction which has been

adopted by the Supreme Court of Kansas, if it appears that the statute has been definitely construed in that State, and held to be inapplicable to the employes of a railway receiver. But we are not satisfied that the court of last resort of that State has ever adopted the construction contended for by counsel for the receivers. On the contrary, we think that its decisions thus far fully support the contention that the employes of a railway receiver are within the purview of the statute. In the case of Trust Co. *v.* Thomason, 25 Kan. 1, the railroad in question was being operated by the Union Trust Company, which appears to have been acting as trustee for mortgage bond holders, and one of its employes, who was a track repairer, was injured by the negligence of a fellow-employe. It was held that he might recover against the trustee, the Union Trust Company, under the statute above quoted. It is true that the court in that case did not discuss the question whether the fact that the trustee was not a "railroad company" deprived its employes of the benefit of the statute, but the question was so obvious that we must presume that it did not escape the observation of the judges of that learned and experienced court. The point chiefly controverted in that case was whether a track repairer, as well as a train operative, was entitled to the benefit of the statute; and, in deciding that question in the affirmative, the court made use of some significant language, which is equally applicable to the case at bar. Thus it was said that "the proper test in determining the question is, does the duty of the employe require him to perform service which exposes him to hazards peculiar to the business of using and operating a railroad?" Furthermore, it was said, in substance, that "the case is within the statute and its constitutional limit" if the "employment is entire, and a part of the continuous service relating to the perilous business of railroading." Not a line

is to be found in the decision which intimates that to entitle a person to the benefit of the statute, who is engaged in the railroad business, and who is daily subject to the perils incident to that employment, he must be actually in the service of a company that was organized as a railroad corporation.

In a later case decided by the Supreme Court of Kansas (Beeson *v.* Busenbark, 44 Kan. 669; 25 Pac. Rep. 48), it was held that the statute did not apply to an employe of certain railroad contractors, who were engaged in constructing a railroad, and, in the prosecution of the work, had occasion to use cars and engines to some extent. A careful analysis of the later case, satisfies us, that the court rested its decision on the ground that the employer in that case was not operating a railroad as a common carrier of freight and passengers, within the meaning of the statute, but was merely using cars and engines incidentally, in the prosecution of the work of railway construction. The case was therefore adjudged to be not fairly within the statute, or within the mischiefs which it was intended to remedy. The case at bar falls within the statute as construed in Trust Co. *v.* Thomason, 25 Kan. 1, and the doctrine of that case is not in conflict, we think, with the later decision in the case of Beeson *v.* Busenbark.

We have examined the cases cited from other States, where similar statutes have been construed (Henderson *v.* Walker, 55 Ga. 481; Thurman *v.* Railroad Co., 56 Ga. 376; and Turner *v.* Cross [Tex. Sup.], 18 S. W. Rep. 578); but we are of the opinion that the Kansas statute has, in effect, been construed by the Supreme Court of that State in a manner which brings the case at bar fairly within the provisions of the statute, and in that view we fully concur. We should entertain the same view if the question was one of first impression. As the plaintiff in error, at the time he was injured, was a baggage man, and as the

intervening petition showed that he was injured by the carelessness of other train men, the Circuit Court erred in sustaining the demurrer and in dismissing his petition on the ground that it did not state a cause of action. The judgment of the Circuit Court is therefore reversed, and the cause is remanded, with directions to overrule the demurrer to the intervening petition, and to proceed with the trial and decision thereof in a manner not inconsistent with this opinion.

Exhibit "B."

ROUSE *v.* HORNSBY.

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1894.

Before Caldwell, Sanborn and Thayer, circuit judges.

Caldwell, J., delivered the opinion of the court: —

In the foreclosure suit of the Mercantile Trust Company against the Missouri, Kansas and Texas Railway Company, commenced in the United States Circuit Court for the District of Kansas, George A. Eddy and Harrison C. Cross were appointed receivers of the road and property of the defendant company and invested with the usual powers of receivers of railroads. John E. Hornsby, the intervener and defendant in error, was in the employ of the receivers as train baggageman, and on the third day of June, 1891, while on a train in the discharge of his duties, received personal injuries in a head-on collision between the passenger train on which he was working and a freight train. The collision resulted from the negligence of the conductor and engineer in charge of the freight train. The defendant in error filed his petition of intervention in the foreclosure suit in which the receivers were appointed to recover damages from the receivers for the personal injuries he received in the collision. A demurrer to this petition was sustained by the Circuit Court and the petition dismissed, whereupon the intervener brought the case by writ of error into this court, where the judgment of the Circuit Court was reversed and the cause remanded with directions to overrule the demurrer to the

intervening petition and proceed with the trial and decision thereof. The contention of the defendants in error in that case, plaintiffs in error in this, was that paragraph 1251, 1 Gen. Stat. Kansas, 1889, did not apply to railroads operated by receivers, and that, as the intervener's injuries resulted from the negligence of his fellow-servants, the receivers were not liable therefor; but this court held the statute cited applied as well to receivers operating a railroad as to a railroad company, and that in Kansas, under this statute, the fact that the injury resulted from the negligence of a fellow-servant was no longer available as a defense, either to a receiver operating a railroad or to a railroad company. Hornsby *v.* Eddy *et al.*, 56 Fed Rep. 461; 5 C. C. A. 560; 12 U. S. App. 404.

After the cause was remanded to the Circuit Court the plaintiffs in error moved that it be referred to a "master, with instructions to find and report on both the law and the facts," and the defendant in error moved that a jury be impaneled to try the issue. The court denied the motion of the plaintiffs in error, and ordered a jury to be called to try the case. There was a verdict and judgment for the intervener, and the defendants sued out this writ of error. An elaborate brief is filed by the plaintiffs in error in support of the contention that the section of the Kansas statute referred to does not apply to receivers operating a railroad, and that as to them the fellow-servant rule of the common law still obtains. This question was carefully considered when this cause was first here. We are entirely satisfied with the result then reached.

While the intervening petition was filed in a chancery suit, it had no relation to any equitable issue in that case, and presented only a cause of action at law which the court very properly impaneled a jury to try. For all practical purposes it was an action at law against the receivers, and the Circuit Court did right in treating it as such. The

plaintiffs in error preferred several requests for instructions, which were refused, and excepted to the instructions given. The instructions which the plaintiffs in error asked the court to give, so far as they are good law, are embodied in the charge of the court. That portion of the charge of the court excepted to relates to the measure of damages. The charge on this subject is in the usual and customary language. The elements that go to make up the damages in such cases are as well known to the jury as to the judge. It is a very plain, practical matter, and it is difficult to perceive what more the court can profitably tell the jury than that in estimating the damages they will take into consideration the age of the plaintiff, his physical condition before and after the injury, the wages or income he was capable of earning before the injury, and the extent and probable duration of the loss of his earning powers resulting from the injury, and that they may include in their assessment of damages a fair and reasonable compensation for the physical pain suffered by the plaintiff as the result of his injury. This was in substance what the court told the jury. These are the very lines the jury, as practical, sensible men, would pursue in estimating the damages, without any instructions from the court. They are based on common sense and are matters of common knowledge. It is neither desirable nor safe to indulge in too much detail and refinement in charging a jury as to what they shall and shall not take into consideration in assessing the damages in this class of cases. Too much detail and refinement serve to confuse and mislead the jury rather than to enlighten them. The law does not require it and the jury does not need it. St. L., I. M. & S. Ry. Co. *v.* Needham, 52 Fed. Rep. 371; 3 C. C. A. 129; 10 U. S. App. 339.

Some exceptions are taken to the instructions given and to the refusal of the court to give others on the question of the defendant's negligence. On this question the charge

of the court was more favorable to the defendants than they had any right to ask. The court should have told the jury that a collision between two of the defendant's trains, operated by their agents, while going at full speed in opposite directions on a single track, was a sufficient evidence of negligence on the part of some of the defendant's servants. The time will probably never come when a collision resulting from an attempt to have two trains going at full speed in opposite directions pass each other on the same track will not be held to be negligence, in law.

The court is asked to reverse the case on the ground that the damages assessed by the jury, $15,000.00, were excessive. The jury is the tribunal appointed by law to assess the damages in such cases and their finding upon that question is conclusive in this court. The judgment of the Circuit Court is affirmed.

This cause was brought here by both writ of error and on appeal, the defendants being in doubt whether this court would treat the intervening petition setting up a legal demand accruing against the receivers as an action at law or a suit in equity. As the intervening petition set up a cause of action exclusively cognizable at law and was tried by jury as such, a writ of error was the appropriate mode of bringing the record into this court.

The appeal in this case will therefore be dismissed.

Filed March 4, 1895.

"Exhibit C."

BEESON *v.* BUSENBARK.

Supreme Court of Kansas, July, 1890.

Horton, C. J.: This was an action in the court below for damages for personal injuries received by Harry E. Busenbark while in the employ of the defendants, Beeson & Selden. The jury returned a verdict for $12,000, and judgment was entered for that amount against the defendants. They complain, and bring the case here.

It appears from the record that the Kansas & Colorado Railroad Company — an auxiliary of the Missouri Pacific Railway — is a corporation organized under the laws of this State, and doing business as a railroad company in this State. W. V. McCracken & Company were the original contractors with the railroad company for the construction of its road through Saline, McPherson, Rice and Barton, and other counties of the State. McCracken & Company sublet the construction of the road to Beeson & Selden, between Salina and the east line of Ness County. McCracken & Company were to furnish all the locomotives, not to exceed three, and cars, including boarding-cars, for the use of Beeson & Selden in carrying out the contract. Beeson & Selden were to receive all material at Salina and transport the same at their own cost and expense, including all unloading, loading and reloading of such material, under the direction of the engineer in charge, and as he should deem necessary. After fifteen miles of track had been laid from Salina west, Beeson & Selden sublet a portion of the work to Bracey & Harris. Bracey & Harris were to do all work in the track laying, and to load and to unload material, but Beeson & Selden were to transport the material and

provide the train service. Beeson & Selden employed and paid the train men, including the plaintiff. Trains were operated on the road by Beeson & Selden. About October 25th, 1886, the Missouri Pacific Railway Company began running trains over the road between Salina and Geneseo. Beeson & Selden retained their own trains in completing the construction of the road. On October 27th, 1886, just after dark, Harry Busenbark, a fireman in the employ of Beeson & Selden, while at Geneseo with his engine, getting ready to go with a train of cars to Salina after material, under the order of his engineer, went under his engine for the purpose of cleaning the ash-box. This caused the engine to move. Busenbark's foot was crushed by one of the wheels of the engine. Subsequently it was amputated.

The petition alleged and the evidence tended to prove that a brakeman, or employe, of Beeson & Selden, whose duty it was to attend to the displaying of warning lights, failed to display any light or signal at the end of the train against which the other one backed. The petition alleged and the evidence tended to prove that both trains were negligently handled by the employes in charge thereof, and that the collision was caused by the negligence of such employes, as well as the failure to display any warning lights or signals. The petition alleged that J. H. Beeson and H. P. Selden were partners as Beeson & Selden in the work of construction. The petition nowhere alleged that Beeson & Selden were a railroad company organized under the laws of this State, or any other State, or that they were a *de facto* railroad company. The evidence upon the trial did not tend to show that Beeson & Selden were a railroad company of this State, or of any other State. The court, among other instructions, gave the following: —

"If the defendants were, at the time of the injury complained of, operating the Kansas & Colorado Railroad, or

running trains upon said road for the purpose of carrying construction material, as well as freight and passengers, when offered, not connected with the road, they would be liable under the statute for any injury which one employe of defendants might receive because of the negligence of another employe, without regard to who or what such negligent employe may be. The statute read as follows: 'Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damages.' And in order to be doing the business of a railroad company, and to be liable under this statute, it is not necessary that they should hold themselves out to be common carriers, or that they should be required to carry all freight and passengers presented. It is the character of the work done, rather than the particular manner in which it is done, or the quantity that is done, that should determine this question. Neither is it necessary that defendants should have absolute control and management of the road. It is sufficient that they actually operate trains upon the road either by themselves or with the co-operation of others."

This instruction was not applicable under the petition or the facts disclosed upon the trial, and therefore was erroneous. Not only was it erroneous, but it was greatly prejudicial to the defendants. The statute referred to was passed in 1874. Its title is, "An act to define the liability of railroad companies in certain cases." The statute so far modifies and changes the common law that a servant or employe of a railroad company may maintain an action against such railroad company for any injury received while in the line of his employment, through the negligence of a fellow-servant or employe engaged with him in

the same common work of the master or employer, unless such injured servant or employe has himself been guilty of negligence or want of ordinary care, which has directly contributed to produce the injury complained of. Previous to the statute of 1874 the rule of law which prevailed in this State exempted from liability all employers, including railroad companies, for injuries to their employes caused by the negligence or incompetency of a fellow-servant, unless they had employed such negligent or incompetent servant without proper knowledge as to his qualification, or had retained him after knowledge of his negligence or incompetency. (Dow *v.* Railway Co., 8 Kas. 642; Railway Co. *v.* Salmon, 11 *id.* 83; 24 Am. Law Rev. No. 2, 175.) This was the rule of the common law. But this rule of the common law was abrogated by the statute of 1874 so far as it related to railroad companies organized in this State, or railroad companies doing business in this State. The statute of 1874 fixes a new liability upon railroad companies organized in this State and railroad companies doing business in this State. This statute is in derogation of the common law; therefore, it is not to be extended by implication or construction.

"As a rule of exposition, statutes are to be construed in reference to the principles of the common law. For it is not to be presumed that the legislature intended to make any innovation upon the common law, further than then case absolutely required. The law rather infers that the act did not intend to make any alteration other than what it specified, and besides what it has been plainly pronounced; for if the legislature had had that design, it is naturally said, they would have expressed it.

Chancellor Kent says:—

"This has been the language of courts in every age, and

when we consider the constant, vehement and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction." (Potter's Dwarris, Stat. 185.)

The statute of 1874 is to be construed strictly. It cannot apply to masters or employers not within its terms. Neither can it be construed to give protection to persons not within the employ of a railroad company. The statute has reference to servants and employes of railroads, not to servants or employes of other masters, companies or corporations. The statute does not include partnerships or persons in the employ of partnerships; it does not include construction companies, or persons in the employ of construction companies; it does not include bridge companies, or persons in the employ of bridge companies, although such partnerships and companies construct railroads, build bridges, and do other public work.

Statutes similar to the one referred to, changing the common law rule between masters and servants, employers and employes, are in force in a number of the States in this country; but with one exception, these statutes are all confined in their operation to railroad companies. The single exception, the Rhode Island statute, embraces only the cases of common law carriers. (7 Am. & Eng. Enclc. of Law, 859; 24 Am. Law Rev. No. 2, 1890, p. 181.)

The legislature has full authority to extend the operation of the statute to all corporations, companies, masters or employers of every occupation or business. It has not seen fit to do so. It might very properly have extended the operation of the statute to all partnerships, masters, or others engaged in the work of operating trains upon rail-

roads or in constructing railroads, or other like work. It has not done so.

In the various opinions of this court, we have frequently held that the statute applied to persons engaged in the hazardous work of operating trains upon a railroad; but in all those cases, we had reference to the employes of a railroad company organized in this State, or of a railroad company doing business in this State. (Railway Co. *v.* Haley, 25 Kas. 35; Railway Co. *v.* Mackey, 33 *id.* 298; Bucklew *v.* Railway Co., 21 N. W. Rep. 103.)

Again, we have held that when a railroad is being constructed, and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company at the time the injuries complained of are committed, has no control thereof, such company is not liable for the damages resulting from the operation of such railroad. (Railway Co. *v.* Fitzsimmons, 18 Kas. 34; Railroad Co. Willis, 38 *id.* 330.)

If the statute of 1874 were extended so as to include the firm of Beeson & Selden and their employes, it must also be extended so as to include every firm, partnership, contractor, or private persons having servants or employes at work on the track or in the yard of a railroad company. (Union Trust Co. *v.* Thomason, 25 Kan. 5; Railroad Co. *v.* Harris, 33 *id.* 416; Railroad Co. *v.* Koehler, 37 *id.* 463.) The statute does not go so far. The courts construe laws, but do not make them.

The trial court attempted to fix a liability on Beeson & Selden under a statute which has no application to them as masters or employers — they not being a railroad company organized in this or any other State. The general rule is, that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The

perils arising from the carelessness and negligence of those who are in the same employment are no exception to this rule. If Beeson & Selden used due diligence in the selection of competent and trusty servants, and furnished them with suitable means to perform the service in which they employed them, and did not retain negligent or incompetent servants after knowledge or notice of their negligence or incompetency, they are not answerable to Busenbark or any other employe for any injury received by them, or either of them, in consequence of the carelessness of any coservant or co-employ while they were engaged in the same service. Outside of the statute Beeson & Selden were required to assume the duty toward their servants and employes of exercising reasonable care and diligence in providing them with a reasonably safe place at which to work, and also in furnishing them proper means or instrumentalities, such as engines, cars, oil, lights, etc., to work with. (Railroad Co. *v.* Holt, 29 Kan. 152; Railroad Co. *v.* Moore, 29 *id.* 632; Railroad Co. *v.* Fox, 31 *id.* 586; Railroad Co. *v.* Weaver, 35 *id.* 434; Railroad Co. *v.* Dwyer, 36 *id.* 69; Railroad Co. *v.* Wagner, 33 *id.* 660; Railroad Co. *v.* McKee, 37 *id.* 592).

As the instruction complained of did not place the liability of Beeson & Selden upon the duty of master and servant under the common law, but solely upon a statute which has no application to them, and applies only to railroad companies organized in this State and to railroad companies doing business in this State, the case was not correctly submitted to the jury.

The judgment of the district court must be reversed.

All justices concurring.

Exhibit "D."

ROUSE *v.* HARRY.

Supreme Court of Kansas, July 6, 1895.

Allen, J. (after stating the facts). The first claim of error is in admitting testimony to prove that the refrigerator cars were constructed with deadwoods which rendered it more dangerous for brakemen to make couplings than ordinary cars. It is said that the defendants were not bound to furnish any particular kind of cars, and the plaintiff, knowing the construction of the cars, assumed the extra hazard. After hearing the testimony on this point, the court instructed the jury that the plaintiff had assumed this risk. It is contended, however, that, notwithstanding this instruction, the jury were prejudiced by the evidence, and led to believe that such cars were unnecessarily dangerous, and that the court should not have permitted the jury to hear such testimony at all. We are unable to perceive how the court could have ruled that the plaintiff had assumed the extra hazard until such facts were developed by the evidence as showed the assumption by the plaintiff of this particular hazard.

It is next contended that the accident was occasioned by the plaintiff's own negligence; that he did not, immediately after the injury, attribute any fault to Canaga; that it was not the duty of Canaga to ride the car down, but to stay with the engine; that there was, in fact, other switching to do, rendering it necessary for him to accompany the engine. It is very clear to our minds that there is ample testimony to sustain the findings of the jury, as well on the question of the negligence of Canaga as on that of contributory neg-

ligence on the part of the plaintiff. The jury have answered, clearly and unequivocally, that Canaga was negligent in allowing the car to run down grade to where the plaintiff was to make the coupling, unattended by any one in a position to answer signals or check its speed. They have also found that the plaintiff could not by the use of his senses determine the rate of speed at which the car was approaching in the darkness; that the plaintiff was free from fault or negligence, and that the injury was occasioned by the negligence of Canaga. The testimony is ample to support these findings, and we find nothing in the record requiring us to interfere with them.

Complaint is made of the eleventh instruction, by which the jury were told that if the plaintiff's negligence was only slight, or the remote cause of the injury, he might recover, if otherwise entitled to a verdict. Under some circumstances, such an instruction is misleading. We have held it to be so in the case of Railroad Co. *v.* Prouty (decided at this term of the court), 40 Pac. 909. It is true, if the plaintiff was negligent in attempting to make the coupling as he did, such negligence was proximate and not remote; but we have no difficulty to contend with in this case on that point, for the jury have expressly found that he was not negligent at all, and that he could not have ascertained, by the use of his senses, the rate of speed at which the car was approaching, and that he used all reasonable and necessary care in making the coupling. The instruction complained of would also appear more objectionable standing alone than it does in connection with the very full and clear instructions accompanying it, by which the attention of the jury was called to the specific claims of negligence, and fairly explaining to them the questions of fact presented by the evidence which they were called on to decide. They have found the plaintiff free from any negligence contributing to the injury. We therefore have no question pre-

sented to us, as to the effect on the plaintiff's right of recovery, of slight or remote negligence on his part, for he was guilty of none.

The seventh instruction is also criticised, but we find no fault in it.

We now proceed to consider the most important question presented by the record in this case, namely whether paragraph 1251 of the General Statutes of 1889 applies as well to receivers operating railroads as to railroad companies. The section reads: "Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damage." The trial court charged the jury that this section did apply in this case. It is contended with great earnestness, on behalf of the plaintiff in error, that this section of the statute does not, in terms, apply to receivers; that it gives a cause of action where none existed at common law; that such a statute must be strictly construed; that it cannot be extended to embrace parties not included within its terms; that receivers are not railroad companies, but officers of the court, and cannot be held liable for injuries received by one employe through the negligence of another. The argument in support of this contention by the learned counsel for the plaintiff in error is clear and forcible, and presents in all its strength, as it appears to us, that side of the question, and his position is sustained by decisions of the Supreme Court of Georgia and Texas under very similar statutes. It is contended that to include receivers is to interpolate, by judicial legislation, that which the legislature has omitted from the statutes. Many authorities are cited denying to the court any such power. It is also urged that this court, in the case of Beeson *v.* Busenbark, 44 Kan. 669, 25 Pac. 48, has practically decided this ques-

tion in accordance with that view. That was an action against Beeson & Selden, who were contractors engaged in the construction of a railroad. They used engines and cars for the transportation of materials, and other purposes connected with the construction of the road, and the plaintiff in that case was injured while employed in cleaning the ash box of an engine. The defendants were not a corporation, but a firm composed of private persons, and were not engaged in the operation of a railroad as common carriers, and it was held that they did not fall within the statute. We are entirely satisfied of the correctness of the decision in that case. The distinction between contractors employed in the construction of a railroad, or of some portion of a road, and a railroad company, operating under a charter from the State, as common carriers of freight and passengers, is broad and well marked. The position of a receiver, however, is in many respects anomalous. He is not, in any sense, the owner of the property; nor is he personally interested, except in the compensation he receives for his services. On the one hand, he represents the court by which he was appointed; and the property in his charge is, in some sense at least, in the custody of the law. On the other hand he represents the interests of the corporation, and also of its creditors. The business which he carries on is public, so far as railways are highways open to the public. It is private, so far as the profits derived from it are concerned. It is somewhat anomalous for courts, through the instrumentality of receivers, to conduct private business for profit; yet the public exigencies and necessities for the continued operation of the great public thoroughfares of the country, no matter what the conflicting rights and interests of stockholders and creditors may be, have been regarded as of such force as to require the continued operation of railroads through the instrumentality of receivers, while the rights of parties litigant are

being adjusted through the medium of the courts. There is no transfer of interest from the corporation to the receiver, but only a transfer of management. The business is carried on, so far as owners and creditors are concerned, for the purpose of securing a profit. This profit goes into the hands of the receiver, to be applied in accordance with the principles of law, and paid to the parties justly entitled to it. The surplus, if any, over operating expenses goes exactly where it would go if the business of the company was honestly conducted by its officers. There is still the same necessity for a multitude of employes to keep its properties in repair and working order, to operate its train service, to collect and disburse its revenues, to keep its accounts, and to protect its interests. Receivers must, in the first instance, always assume control and generalship over the army of workers they find in the employ of the company. While they have the power to employ and discharge, the general rule is that the force they find already organized is retained and used, except where found incompetent or inefficient. The receiver becomes, in effect, the general manager, charged with the general supervision of the interests of the company, not through election by the stockholders or board of directors, but by appointment of the court. He stands charged with the performance, then, of the corporate functions of the railroad company. He causes trains to be run, and freight and passengers, mails, and express matter to be transported for hire. He collects all the revenues derived from the service. From them he pays all the employes for their services, and discharges all other operating expenses. In substance, then, the business of a railroad corporation in the hands of a receiver moves on as though under the direction of a general manager, to accomplish the same public purposes, to perform the same services for its patrons, to obtain for its bondholders and stockholders the same revenues as before. The receiver,

when acting in pursuance of and in obedience to the orders of the court, incurs no personal liability, and has no personal interest in the profits or losses of the business. The substance, then, of the whole matter is that the railroad corporation is neither dead nor dormant. It is, in fact, alive, active, and performing its proper functions, as much as before. Its properties are in existence and utilized for the same purposes as ever. Does, then, the mere shadow of a receivership operate to completely transform the relations its employes sustain to each other and to the assets of the company? For the life and body of a corporation are its franchises, its business, and its property. It is not a sentient being, and has no tangible or personal existence. A suit against a receiver is in form against an individual, but in substance it is against the corporate property in his charge. It is, in all essential particulars, in substance against the corporation itself. We think this is the view best sustained by the authorities, and most in consonance with reason and sound principles. "It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, viz., of body and soul. The letter of the law is the body of the law, and the sense and reason of the law are the soul of the law. Quia ratio legis est anima legis." Intoxicating Liquor Cases, 25 Kan. 763, citing Eyston *v.* Studd, 2 Plow. 465. The case of Trust Co. *v.* Thomason, Kan. 1, was an action against the trust company by an employe to recover damages under the same section of the statute now under consideration; and, although the question as to the applicability of the statute to the case of a trustee operating the road is not much discussed in the opinion, the principle on which a liability was sustained in that case is very similar to that under consideration in this. The Union Trust Company was not a railway company, and therefore not within the letter of the statute; but it was

operating a railroad, and the liability, which could arise only by force of the statute, was maintained in that case. In the case of Hornsby *v.* Eddy, 5 C. C. A. 560; 56 Fed. 461, the identical question now before us was passed on by the United States Circuit Court of Appeals for the Eighth Circuit. The statute was held to apply, notwithstanding the Georgia and Texas cases, which are cited in the opinion. The case of Trust Co. *v.* Thomason was regarded as, in effect, a construction of the statute in favor of the liability of a receiver. The decision was on a demurrer to the petition. The case was afterwards tried, a verdict and judgment rendered against the receivers for $15,000, the case again taken to the Court of Appeals (67 Fed. 219), and the judgment affirmed. Judge Caldwell, in delivering the opinion, says: "An elaborate brief is filed by the plaintiffs in error in support of the contention that the section of the Kansas statute referred to does not apply to receivers operating a railroad, and that as to them, the fellow-servant rule as to the common law still obtains. This question was carefully considered when the case was first here. We are entirely satisfied with the result then reached." Although the construction placed on the statute of this State by the Federal court is not binding on us, the views of a court of such high character are entitled to most respectful consideration. The Iowa statute, which in terms applies not only to the corporation, but to lessees and other persons owning or operating railroads, was held by the Supreme Court of that State in the case of Sloan *v.* Railway Co., 62 Iowa, 728; 16 N. W. 331, to include receivers. In the case of Railway Co. *v.* Cox, 12 Sup. Ct. 905, the Supreme Court of the United States held that, as the statutes of Louisiana authorized an action against the receivers of a railway company for wrongfully causing the death of a brakeman, an action might be maintained in Texas against the receivers for acts done in Louisiana, not-

withstanding the decision of the Supreme Court of Texas in the case of Turner *v.* Cross, 18 S. W. 578. For other cases bearing more or less directly on this question, see Little *v.* Dusenberry, 46 N. J. Law, 614; Farrell *v.* Trust Co., 77 Mo. 479; Klein *v.* Jewett, 26 N. J. Eq. 476; Murphy *v.* Holbrook, 20 Ohio St. 137. Complaint is made that the verdict is excessive, but we cannot say that it is so. The judgment is affirmed. All the justices concur.

161 U.S. 591

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 765.

THEODORE F. BROWN, APPELLANT,

vs.

JOHN W. WALKER, UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 7, 1895.

(16,055.)

(16,055.)

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INDEX.

	Original.	Print.
Caption	1	1
Docket entries	1	1
Petition for writ of *habeas corpus*	3	2
Certificate of grand jury to district court	6	3
Order of district court granting rule to show cause	9	5
Order of district court directing Brown to answer questions	10	5
Certificate of grand jury to district court	11	5
Order of district court adjudging Brown in contempt	12	6
Writ of *habeas corpus*	13	6
Marshal's return	14	7
Order fixing time for hearing and admitting petitioner to bail	15	7
Bail bond	16	7
Order for release of petitioner upon giving bond	17	8
Bail bond	18	8
Opinion of Judge Buffington	19	9
Opinion of Judge Acheson	27	13
Final order discharging writ and remanding petitioner	28	14
Petition of appeal	29	14
Order allowing appeal	30	15
Appeal bond	31	15
Assignment of errors	33	16
Citation	36	17
Certificate to record	37	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1895.

1 Among the rolls, records, and judicial proceedings in the circuit court of the United States for the western district of Pennsylvania, at No. 1, November term, 1895, may be found the following words and figures, to wit:

THEODORE F. BROWN *vs.* JOHN W. WALKER, United States Marshal. } No. 1. November Term, 1895. *Habeas Corpus.*

Docket Entries.

May 7, 1895.—Petition of Theodore F. Brown for a writ of *habeas corpus* presented in open court, and a writ of *habeas corpus* is allowed pursuant to the prayer thereof, returnable forthwith. Petition filed and writ of *habeas corpus* issued, returnable forthwith.

And now, to wit, May 7th, 1895, the writ of *habeas corpus* having been duly served upon John W. Walker, U. S. marshal, and he having made return thereto and produced the body of Theo. F. Brown in court, it is ordered that (the plaintiff consenting) the case stand for hearing at such time as shall be agreed upon by counsel or shall be fixed by further order of the court, or, further, that upon giving bail in the sum of one thousand dollars by his own recognizance the plaintiff is discharged from custody until the hearing of this cause or the further order of the court. Bail given in the sum of one thousand dollars.

1895, May 7th.—This cause came on to be heard upon petition and return and was argued by counsel *pro* and *con*.

C. A. V.

2 1895, Sept. 11th.—Opinion of the court filed directing that Theo. F. Brown, petitioner, be remanded to the custody of the marshal.

1895, Sept. 13th.—On motion of plaintiff's attorneys, it is ordered that the said petitioner, Theo. F. Brown, be released from the custody of the marshal upon his filing a bond, in the sum of one thousand dollars, conditioned for his appearance before the grand jury at its next session or at such time as may be required under final judgment herein upon writ of error, should such writ be taken.

And now, to wit, September 11, 1895, this case having been heard upon petition, writ of *habeas corpus*, and return thereto, and having been argued by counsel, it is ordered, adjudged, and decreed that the petition of the said Theodore F. Brown be dismissed; that the writ of *habeas corpus* granted in this case be discharged; that the said Theodore F. Brown be remanded to the custody of John W. Walker, United States marshal, the respondent in this case, and that said petitioner pay the costs of this proceeding.

And now, Sept. 25th, 1895, it is ordered that the within decree be filed by the clerk *nunc pro tunc* as of date Sept. 11, 1895.

1895, Sept. 30th.—Appeal to supreme court allowed and filed and bond approved and filed. Same day assignments of error filed.

1895, Oct. 5th.—Citation allowed and issued and served on John W. Walker, United States marshal.

3 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN
vs.
JOHN W. WALKER. } No. —. November Term, 1895.

The petition of Theodore F. Brown respectfully showeth unto your honorable court as follows:

On the 6th day of May, 1895, he was served with a subpœna to appear at Pittsburgh before the grand jury of the United States duly sworn in the said western district in the case of The United States *vs.* E. P. Bates and Thomas R. Robinson, charged as officers and agents of the Allegheny Valley Railway Company with the violation of the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and its supplements or amendments; that upon the 7th day of May, in compliance with said subpœna, your petitioner appeared before the said grand jury, and, being then and there interrogated, made answers to certain questions that he is and was at the time of the alleged acts upon the part of said defendants the auditor of the said Allegheny Valley Railway Company, and as such auditor audited the accounts of the various officers of said company and the accounts of the freight department thereof, and, upon being interrogated as to the freight rates, rebates, if any, and other matters, made answer that he declined to answer for the reason that such answer and answers would tend to accuse and incriminate him; thereupon all the said questions and answers were duly certified by the grand jury to the said district court for said district, praying the court to make such order therein as to the court should seem meet and proper, and the said court thereupon granted a rule upon your petitioner to show cause why he should not answer the said questions which he had theretofore declined to answer or be adjudged
4 in contempt; to which rule your petitioner appeared, and upon the hearing thereof the said district court ordered him to appear before the said grand jury without delay and answer the said questions; that thereafter, upon the same day, your petitioner was again called before the said grand jury and questions to the same effect and purport again presented to him, and he thereupon made similar answer to said questions, to wit, that he declined to answer the same for the reason that said answer and answers would tend to accuse and incriminate himself; that the said refusal and the reason therefore were also certified to the said court by the said grand jury; and your petitioner, being called to the bar of said court, was thereupon adjudged to be in contempt of court and ordered to pay a fine of five dollars and committed to the custody of the United States marshal until he should pay said fine and answer the questions aforesaid and all questions of similar import. Your petitioner attaches hereto and makes part hereof true copies of all the questions and answers aforesaid, the certificates or reports of said grand jury as presented to the said district court, and of all the orders of said court and the proceedings in the matter aforesaid.

Your petitioner, further showing unto your honorable court that he is now in the custody of the United States marshal for the western district of Pennsylvania under the said order of said district court, avers that the proceeding in which he was so called and interrogated as a witness was a criminal case; that the answers of your petitioner to the several questions which he declined to answer as aforesaid would tend to incriminate him, and that by compelling him to answer them he would be compelled to be a witness against himself, contrary to the provisions of the Constitution of the United States, and especially the fourth and fifth amendments thereof; that any act or acts of Congress purporting to require or compel him against his will to *to* testify are unconstitutional, null, and void; that the said district court had no jurisdiction to compel him to answer said questions, and its order to that effect, as well as its order adjudging him to be in contempt and committing him to the custody of the marshal, was void, and that he is thus unlawfully detained and restrained of his liberty, contrary to the Constitution and laws of the United States.

Your petitioner therefore prays your honorable court to grant him a writ of *habeas corpus*, under the seal of said court, directed to John W. Walker, United States marshal for the western district of Pennsylvania, commanding him to have the body of your petitioner before your honorable court immediately, to do, submit to, and receive whatsoever your honors may consider right in that behalf, and likewise to show the cause of such detention; and your petitioner will ever pray.

THEO. F. BROWN.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

On the seventh day of May, 1895, before me, the undersigned, personally appeared Theodore F. Brown, the above-named petitioner, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct, as he verily believes.

THEO. F. BROWN.

Sworn and subscribed before me the day and year aforesaid.

H. D. GAMBLE, *Clerk.*

6 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES
vs.
E. P. BATES and THOMAS R. ROBINSON. } No. —. May Term, 1895.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand inquest of the United States of America now inquiring in and for the western district of Pennsylvania upon their oaths

and solemn affirmations respectively respectfully represent that on the seventh day of May, A. D. 1895, while the inquest aforesaid was engaged in investigating into certain alleged violations in the district aforesaid of an act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and the various amendments and supplements thereto, by E. P. Bates and Thomas R. Robinson, officers and agents of the Allegheny Valley Railway Company, one THEODORE F. BROWN appeared for examination in response to a subpœna which had been served upon him, and, after having been duly sworn, testified as follows:

Q. What is your name?

A. Theodore F. Brown.

Q. What is your business?

A. Auditor of the Allegheny Valley Railway Company.

Q. Is it your duty as auditor of the Allegheny Valley Railway Company to audit the accounts of the various officers of that company?

A. It is.

7 Q. Do you audit all monies paid out by the various officers of the said railway company and pass upon the sufficiency of the vouchers therefor?

A. I do.

Q. Have you audited the accounts of the freight department of the said railway company during the years 1894 and 1895?

A. I have.

Q. Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August, and September, 1894, coal from any points on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?

A. That question, with all respect to the grand jury and yourself, I must decline to answer for the reason that my answer would tend to accuse and incriminate myself.

Q. Do you know whether the Allegheny Valley Railroad Company, during the year 1894, paid to the Union Coal Company any rebate, refund, or commission on coal transported by said railroad company from points on its Low Grade division to Buffalo, whereby the Union Coal Company obtained a transportation of such coal between the said terminal points at a less rate than the open tariff rate or the rate established by said company? If you have such knowledge, state the amount of such rebates or drawbacks or commissions paid, to whom paid, the date of the same, and on what shipments; and state fully all the particulars within your knowledge relating to such transaction or transactions.

A. That question I must also decline to answer for the reason already given.

8 We hereby certify that the foregoing is a true and correct statement of the several questions and answers propounded to and answered by the said Theodore F. Brown during the investi-

gation by our inquest as aforesaid. and respectfully pray the honorable court aforesaid to make such order touching the refusal of the witness to answer the questions propounded before the inquest aforesaid as may seem to the court meet and proper.

(Signed) GEORGE D. HOWELL, *Foreman.*

Attest: FRANK H. WHITE, *Clerk.*

9 In the District Court of the United States for the Western District of Pennsylvania.

And now, May 7th, 1895, upon presentation of the above report of the grand inquest and upon motion of Harry Alvan Hall, attorney of the United States, a rule is granted upon the said Theodore F. Brown to appear and show cause why he should not answer the said questions or be adjudged in contempt of our said court.

Returnable forthwith.

(Signed) BY THE COURT.

Service accepted.

(Signed) THEO. F. BROWN.

May 7th, 1895.

10 *In Re Rule on Theodore F. Brown to Show Cause Why He Should Not Be Adjudged Guilty of Contempt.*

No. —. May Term, 1895.

In the District Court of the United States for the W. District of Penna.

And now, May 7th, A. D. 1895, upon a hearing on the above rule, it is found that the excuses and reasons advanced on behalf of Theodore F. Brown as to why he should not answer said questions are wholly insufficient, and the said Theodore F. Brown is directed to appear before the said grand jury without delay and there answer the said questions, and also such further questions touching the matter under inquiry before the grand jury and which shall be pertinent to such injury as shall be propounded to him by any member of the grand jury or the U. S. attorney or any of his assistants.

(Signed) BY THE COURT.

11 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES
vs.
E. P. BATES and THOMAS R. ROBINSON. } No. —. May Term, 1895.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Now, May 7th, A. D. 1895, the grand inquest of the United States of America now inquiring in and for the western district of Penn-

sylvania respectfully report that Theodore F. Brown, in pursuance of an order of the district court of the United States for the western district of Pennsylvania, made upon the seventh day of May, A. D. 1895, this day appeared before the grand inquest aforesaid and, notwithstanding the said order of court, still refused to answer the questions which he had previously refused to answer as heretofore certified to the said court by this inquest and gave as his reason for such refusal the same reasons which he had previously given, and which are fully set forth in the certificate of this inquest aforesaid.

GEORGE D. HOWELL, *Foreman.*

Attest: FRANK H. WHITE.

12 *In Re Rule on Theodore F. Brown to Show Cause Why He Should Not Be Adjudged Guilty of Contempt.*

No. —. May Term, 1895.

In the District Court of the United States for the Western District of Penna.

And now, May 7th, A. D. 1895, after hearing, Theodore F. Brown is adjudged to be in contempt of court, and it is ordered and adjudged that he pay a fine of five dollars and the costs of this proceeding, and the marshal is directed to take him into custody and hold him until he shall have answered the questions which he has refused to answer before the grand jury and all questions of similar import which shall be propounded to him by any member of the grand jury or district attorney or any of his assistants in the presence of such jury and until he shall pay such fine and costs.

BY THE COURT.

13 UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } ss:

The President of the United States to John W. Walker, marshal for the western district of Pennsylvania:

You are hereby commanded that you have the body of Theodore F. Brown, by you detained as it is said, with the cause of such detention, before the judges of the circuit court of the United States for said district, at the United States court-room, in the city of Pittsburgh, on the seventh day of May, 1895, and receive what shall then and there be considered concerning the said Theodore F. Brown.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Pittsburgh, this 7th day of May, 1895.

H. D. GAMBLE, *Clerk.*

Service of above writ accepted this May 7th, 1895.

JOHN W. WALKER,
U. S. Marshal.

14 MAY 7TH, 1895.

To the honorable the judges of the United States circuit court:

The body of the within-named Theodore F. Brown, in my custody, I have ready, as within commanded, and further return that I detain the said Theodore F. Brown pursuant to an order of the district court of the United States for the western district of Pennsylvania made May 7, 1895, as follows, viz:

"And now, May 7th, A. D. 1895, after hearing, Theodore F. Brown is adjudged to be in contempt of court, and it is ordered and adjudged that he pay a fine of five dollars and the costs of this proceeding, and the marshal is directed to take him into custody and hold him until he shall have answered the questions which he has refused to answer before the grand jury and all questions of similar import which shall be propounded to him by any member of the grand jury or district attorney or any of his assistants in the presence of such jury and until he shall pay such fine and costs.

"BY THE COURT."

So answers—

JOHN W. WALKER,
Marshal of the United States for the Western District of Pennsylvania.

15 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN
vs.
JOHN W. WALKER. } No. 1. November Term, 1895.

And now, to wit, May 7th, 1895, the writ of *habeas corpus* having been duly served upon John W. Walker, United States marshal, and he having made return thereto and produced the body of the said Theodore F. Brown in court, it is ordered (the plaintiff consenting) that this case stand for hearing at such time as shall be agreed upon by counsel or as shall be fixed by the further order of the court; and, further, that upon giving bail in the sum of one thousand dollars by his own recognizance the plaintiff is discharged from custody until the hearing of the cause or the further order of the court.

BY THE COURT.

16 UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

You do acknowledge yourself indebted to the United States of America in the penal sum of one thousand dollars, lawful money of the United States, to be levied of your goods and chattels, lands and tenements, to the use of the said United States, and to which payment, well and truly to be made to the said United States, you do bind yourself, your heirs, executors, and administrators, and each and every of them, jointly and severally, firmly by these presents.

Dated at Pittsburgh this 7th day of May, A. D. 1895.

Now, the condition of this obligation is such that if Theodore F. Brown, who has been charged with contempt of court, shall be and appear at the further order of the United States circuit court for the western district of Pennsylvania, to be holden at the city of Pittsburgh on the second Monday of November next, then and there to answer any charge or charges that may be then and there alleged against him, and not depart the court without leave, then the obligation to be void; otherwise to remain in full force and virtue.

THEO. F. BROWN.

Taken and acknowledged before me this 7th day of May, A. D. 1895.

H. D. GAMBLE,
Clerk U. S. Circuit Court.

17 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN
vs.
JOHN W. WALKER, United States Marshal. } No. 1. November Term, 1895.

And now, September 13, 1895, upon motion of plaintiff's attorneys, it is ordered that the plaintiff, Theodore F. Brown, be released from the custody of the marshal until the reconvening of the grand jury and until final judgment herein upon writ of error, should such writ be taken, upon his filing his bond or recognizance in the sum of one thousand dollars, conditioned for his appearance before the grand jury at its next session or at such time as may be required under final judgment herein.

BY THE COURT.

18 UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

You do acknowledge yourself indebted to the United States of America in the penal sum of one thousand dollars, lawful money of the United States, to be levied of your goods and chattels, lands and tenements, to the use of the said United States, and to which payment, well and truly to be made to the said United States, you do bind yourself, your heirs, executors, and administrators, and each and every of them, jointly and severally, firmly by these presents.

Dated at Pittsburgh this 13th day of September, A. D. 1895.

Now, the condition of this obligatio*b* is such that if Theodore F. Brown, who has been charged with contempt in refusing to answer questions propounded to him as a witness before the grand jury and upon hearing upon writ of *habeas corpus* remanded to the custody of the marshal to be released upon giving bond in $1,000.00 for his appearance before the grand jury at the next term of the United States district court or to abide the final judgment of the court upon writ of error, if such writ be taken, shall be and appear at the next regular term of the district court of the United States for the

western district of Pennsylvania, to be holden at Pittsburgh on the third Monday of October, A. D. 1895, then and there to answer any charge or charges that may be then and there alleged against him and abide the final judgment of the court herein and not depart the court without leave, then the obligation to be void; otherwise to remain in full force and virtue.

THEO. F. BROWN.

Taken and acknowledged before me this 13th day of September, A. D. 1895.

H. D. GAMBLE,
Clerk U. S. Circuit Court.

19 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN
vs.
JOHN W. WALKER, United States Marshal. } No. 1. November Term, 1895.

In re habeas corpus before Acheson, circuit judge, and Buffington, district judge.

BUFFINGTON, *J.*:

On May 6th, 1895, the grand jury of the district court of the United States for the western district of Pennsylvania had under consideration an indictment charging E. P. Bates and Thomas R. Robinson, officers and agents of the Allegheny Valley Railway Company, with alleged violations of the interstate-commerce law approved February 4th, 1887, and its supplements. Theodore F. Brown, the petitioner, who is the auditor of said company, appeared before the grand jury upon subpœna. He declined to answer certain questions as to freights charged and rebates given by said road as follows:

"Q. Have you audited the accounts of the freight department of the said railway company during the years 1894 and 1895?

A. I have.

Q. Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company during the months of July, August, and September, 1894, coal from any
20 points on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?

A. That question, with all respect to the grand jury and yourself, I must decline to answer for the reason that my answer would tend to accuse and criminate me.

Q. Do you know whether the Allegheny Valley Railway Company during the year 1894 paid to the Union Coal Company any rebate, refund, or commission on coal transported by said railroad company from points on its Low Grade division to Buffalo, whereby the Union Coal Company obtained a transportation of such coal between the said terminal points at a less rate than the open tariff

rate or the rate established by said company? If you have such knowledge state the amount of such rebates or drawbacks or commissions paid, to whom paid, the date of the same or on what shipments, and state fully all the particulars within your knowledge relating to such transaction or transactions.

A. That question I must also decline to answer for the reasons already given."

Upon report of these facts made by the grand jury through George D. Howell, Esq, its foreman, the district court granted a rule upon Mr. Brown to show cause why he should not answer the questions or be adjudged guilty of contempt. He again refused for the same reasons, and on report thereof made to the court he was by it adjudged guilty of contempt, sentenced to pay a fine, and committed to the custody of the marshal until he paid the same and answered the questions. On May 7th, 1895, he presented a petition to the circuit court for a writ of *habeas corpus*. In it, after setting forth the above facts, he alleged his answers would tend to
21 incriminate him, and if compelled to answer he would be forced to be a witness against himself, contrary to the provisions of the amendment to the Constitution; that the act compelling him to testify was unconstitutional; that the district court had no jurisdiction to require him to answer these questions, and that his detention by the marshal was unlawful. Thereupon the writ issued, and to it the marshal made return justifying petitioner's detention under the order of the district court.

The fifth amendment to the Constitution provides: "No person * * * shall be compelled, in any criminal case, to be a witness against himself," and in Counselman *vs.* Hitchcock, 142 U. S., 547, it was held this provision was not confined to a criminal case against the party himself; that its object was to ensure that one should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show he had committed a crime. It was also held that R. S., sec. 860, which provides that no evidence given by a witness shall be in any manner used against him in any court of the United States in any criminal proceedings, did "not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard and is not a full substitution for that prohibition," and afforded "no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime and of sources of information which may supply other means of convicting the witness or party."

Following this decision the act of February 11th, 1893, was passed, which provides "that no person shall be excused from attending and testifying * * * in any cause or proceed-
22 ing, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject

him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise * * * in any such case or proceeding."

The constitutionality of this act is now challenged on the ground, first, that the constitutional provision already quoted is a protection not only from pains and penalties, but from the infamy which follows the disclosure of the commission of a crime; that the act simply relieves from pains and penalties; second, that the act does not give a protection as broad as the constitutional privilege, because it places the witness under the necessity of proving the fact, etc., of his having been called to testify and leaves him exposed to the jeopardy of conviction, and, third, the act is in substance a pardon and an infringement on the pardoning power vested by the Constitution in the Executive.

The question is one of grave importance to the petitioner, as involving his alleged constitutional rights, and to the general public, as involving the enforcement of the interstate-commerce law. It is clear if the witness is justified in his refusal to answer, the enforcement of that law is virtually impossible, since violations thereof can be proved only by those who would refuse to answer. Unfortunate as this might be, still, if the enforcement of any act of Congress sacrifices the constitutional rights of the citizen, the act
23 must yield to the higher law of the Constitution; but when a statute has been passed by the legislative branch of the Government the judicial branch will act with great caution in declaring it unconstitutional, and will do so "only," as Chief Justice Black said in Sharpless *vs.* The Mayor of Philadelphia, 21 Pa. St., 164, "when it violates the Constitution clearly, palpably, plainly, and in such a manner as to leave no doubt or hesitation on our minds." For, as Chief Justice Marshall said in Fletcher *vs.* Peck, 6 Cranch, 128, "the question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes, but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The provision that "no person * * * shall be compelled in any criminal case to be a witness against himself" placed the bulwark of constitutional protection around that which had long been a recognized right of the citizen under the rules of evidence, and was summed up in the time-honored maxim, "*Nemo tenetur se ipsum accusare.*" 1 Starkie on Evidence, 71, 191; 1 Greenleaf on Evidence, sec. 451; Wharton's Criminal Evidence, sec. 463, and cases cited; p. 464 of 142 U. S., *supra*. It was meant

to protect him from self-crimination, to exempt him from making disclosures which might lead to his subsequent conviction. It was embodied in an amendment which in its other provisions secured his rights in criminal cases, viz., the safeguard of a precedent indictment or presentment, against him being put twice in jeopardy for the same offense, and ensured him due process of law when life and liberty were at stake. Clearly its purpose was to shield him from compulsory disclosures which might lead to his conviction of a crime. If the constitutional purpose was to shield him from disclosures which would merely tend to humilitate or disgrace him in the eyes of his fellows, it was not so expressed. Judging from the character of the instrument itself, which is admittedly a model of simplicity and clearness, it is fair to assume that if such a right were deemed worthy of the dignity of constitutional protection it would have been stated in words so plain "that he may run that readeth it." But the obligation of a witness to answer questions of that character, if pertinent to the issue, is well recognized. 1 Roscoe's Criminal Evidence, 234; 1 Greenleaf's Evidence (14th edition), sec. 455, 456, 458, and 459; Thompson on Trials, sec. 287; Jennings *vs.* Prentice, 38 Mich., 421. And in Parkhurst *vs.* Lowten, 1 Merivale, 400, Lord Eldon said: "Upon the question of character I hold that, supposing a man to be liable to penalty or forfeiture, provided he is sued within a limited time and that the suit is not commenced till after the limitation expired, he is bound to answer fully, notwithstanding his answer may tend to cast a very great degree of reflection upon his character and conduct." In Commonwealth *ex rel.* Keller *vs.* Roberts, Brightly's Reports, 109, it was held it was competent for the legislature of Pennsylvania to pass an act under which a witness may be compelled to answer questions which may not show him to be criminal, but which involve him in shame and reproach.

To our mind it is clear the infamy or disgrace to a witness which may result from disclosures made by him are not matters against which the Constitution shields, and that so long as such disclosures do not concern a crime of which he may be convicted the provision quoted does not apply.

But does the act of Congress give the petitioner as broad protection as the constitutional provision? Unquestionably it does. It says he "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise." This affords him absolute indemnity against future prosecution for the offense to which the question relates. The act of testifying has, so far as he is concerned, wiped out the crime; it has excepted him from the operation of the law, and as to him that which in others is a crime has been expunged from the statute books. If, then, there exists as to him no crime, there can be no self-crimination in any testimony he gives, and if there can be no self-crimination, if neither conviction, judgment, nor sentence can directly or indirectly result from his testimony, what need has he for the constitutional provision? For, says Broom's Legal Maxims,

p. 654, in speaking of the maxim quoted above, "Where, however, the reason for the privilege of the witness or party interrogated ceases the privilege will cease also, as if the prosecution to which the witness might be exposed on his liability to a penalty or forfeiture is barred by lapse of time or if the offense has been pardoned or the penalty or forfeiture waived," a doctrine approved, as we have seen above, by Lord Eldon.

In practical effect the legislative act throws a greater safeguard around the petitioner than the constitutional provision. Be-
26 fore he testified he could have been charged with a violation of the interstate-commerce law, in which case the amendments only protected him against compulsory self-crimination. He was liable to a possible verdict of guilty if the necessary proofs were given, but under the legislative act, when he has testified, the law excepts him from its operation, makes that which was before a possible crime a mere matter of indifference and shields him from subsequent prosecution. The sweeping words of the statute—as broad as human language can make them—afford absolute indemnity to the witness; no crime exists as to him; it is not a pardon; not an act of amnesty; no charge can be made against him, for it is illegal to even prosecute him, viz: "No person shall be prosecuted."

To our mind the constitutional provision in words and purpose is plain. In the Counselman case the witness was protected from the manifestly self-criminating answers which would have disclosed facts upon which a prosecution—to which he was still left exposed—could be based, but owing to the act of 1893 no such consequence can ensue if the present petitioner is made to answer.

Such being the case, the constitutional provision does not concern him, and if it does not the act which compels him to testify is not unconstitutional.

In reaching this conclusion we have given due regard to the case of The United States *vs.* James, 60 Fed. Rep., 257, where the act was held to be unconstitutional. While we regret to differ from this only Federal decision on the matter, we find support for our position in the opinion of the supreme court of New Hampshire in The State *vs.* Nowell, 58 N. H., 314, and of the supreme court of California in *Ex parte* Lewis Cohen, 26 L. R. A., 423.

The prayer of the petitioner to be discharged will therefore be denied and he will be remanded to the custody of the marshal.

27 ACHESON, *Circuit Judge:*

I entirely concur in the views expressed by Judge Buffington in the foregoing opinion; that opinion is so full and satisfactory that I need do little more than announce my concurrence. The act of February 11th, 1893, affords the witness complete immunity from prosecution and from penalty or forfeiture for or on account of the offence to which the questions propounded to him relate, and therefore his answers cannot tend to criminate him. As he cannot be subjected to any prosecution, penalty, or forfeiture, his case is not within either the letter or the spirit of the fifth amendment to the Constitution of the United States.

28 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN, Petitioner,
vs.
JOHN W. WALKER, United States Marshal, Respondent.

No. 1. November Term, 1895. *Habeas Corpus.*

Final Order.

And now, to wit, September 11, 1895, this case having been heard on petition, writ of *habeas corpus* and return thereto, and having been argued by counsel, it is ordered, adjudged, and decreed that the petition of the said Theodore F. Brown be dismissed; that the writ of *habeas corpus* granted in this case be discharged; that the said Theodore F. Brown be remanded to the custody of John W. Walker, United States marshal, the respondent in this case, and that said petitioner pay the costs of this proceeding.

BY THE COURT.

And now, to wit, Sept. 25th, 1895, it is ordered that the within decree be filed by the clerk, *nunc pro tunc*, as of date Sept 11, 1895.

BY THE COURT.

29 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN, Petitioner,
vs.
JOHN W. WALKER, United States Marshal, Respondent.

No. 1. November Term, 1895. *Habeas Corpus.*

Appeal of Petitioner.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, } *ss:*

And now, to wit, September 27th, 1895, comes the above-named petitioner, Theodore F. Brown, conceiving himself aggrieved by the order entered by this court September 11, 1895, in the above-entitled proceeding, and showing to the court that said case involves the construction and application of the Constitution of the United States and the constitutionality of an act passed by the Congress of the United States, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM SCOTT,
GEORGE B. GORDON,
Attorneys for Petitioner and Appellant,
450 *Fourth Avenue, Pittsburgh, Pa.*

30 UNITED STATES OF AMERICA, } ss:
Western District of Pennsylvania, City of Pittsburgh, }

Theodore F. Brown, being duly sworn according to law, deposes and says that the above appeal is not taken for delay.

THEO. F. BROWN.

Sworn and subscribed before me this 27th day of September, 1895.

OSCAR H. ROSENBAUM,
[SEAL.] *Notary Public.*

And now, September 30th, 1895, it is ordered that the appeal be allowed as prayed for.

JOS. BUFFINGTON,
Sitting as Circuit Judge.

31 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN, Petitioner,
vs.
JOHN W. WALKER, United States Marshal, Respondent. } No. 1. November Term, 1895. *Habeas Corpus.*

Bond.

UNITED STATES OF AMERICA, }
Western District of Pennsylvania. }

Know all men by these presents that we, Theodore F. Brown and Thos. R. Robinson, of the city of Pittsburgh, county of Allegheny and State of Pennsylvania, are held and firmly bound unto John W. Walker, United States marshal for the western district of Pennsylvania, in the sum of five hundred dollars ($500), to be paid to the said obligee, his administrators, executors, or assigns; to which payment, well and truly to be made, the said obligors do bind themselves, their heirs, executors, and administrators firmly by these presents.

In witness whereof we have hereunto set our hands and seals this twenty-seventh day of September, A. D. 1895.

Whereas the above-named Theodore F. Brown has taken an appeal to the Supreme Court of the United States from a decision of the circuit court of the United States for the western district of Pennsylvania, in a certain writ of *habeas corpus*, in which
32 said proceeding the said Theodore F. Brown is petitioner and the said John W. Walker, United States marshal, is respondent, at No. 1, November term, 1895:

Now, the condition of this obligation is such that if the above-named Theodore F. Brown shall prosecute his said appeal with effect and shall, if he fail to make good his appeal, well and truly

pay all costs and damages, then this obligation to be void; otherwise to be and remain in full force and virtue.

THEO. F. BROWN. [SEAL.]
THOMAS R. ROBINSON. [SEAL.]

Signed, sealed, and delivered in presence of—
O. H. ROSENBAUM.

And now, to wit, Sept. 30th, 1895, the foregoing bond presented and approved.

By the court:

JOS. BUFFINGTON, *Judge.*

33 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN, Petitioner, *vs.* JOHN W. WALKER, United States Marshal, Respondent. } No. 1. November Term, 1895. *Habeas Corpus.*

Assignments of Error.

UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } *ss:*

And now, to wit, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and ninety-five, comes the said Theodore F. Brown, the petitioner, by William Scott and George B. Gordon, his attorneys, and says that in the record and proceedings in the above-entitled matter there was error in this, to wit:

I.

The court erred in making the following order, to wit: "And now, to wit, September 11, 1895, this case having been heard on petition, writ of *habeas corpus* and return thereto, and having been argued by counsel, it is ordered, adjudged, and decreed that the petition of the said Theodore F. Brown be dismissed; that the writ of *habeas corpus* granted in this case be discharged; that the said Theodore F. Brown be remanded to the custody of John W. Walker, United States marshal, the respondent in this case, and that said petitioner pay the costs of this proceeding."

34 II.

The court erred in not sustaining the prayer of the petition and directing that your petitioner be discharged by the respondent from his custody.

III.

The court erred in not holding that the order of the district court of the United States for the western district of Pennsylvania, under color of which petitioner is detained, which order is as follows, to wit:

"And now, May 7th, A. D. 1895, after hearing, Theodore F. Brown is adjudged to be in contempt of court, and it is ordered and adjudged that he pay a fine of five dollars and the costs of this proceeding, and the marshal is directed to take him into custody and hold him until he shall have answered the questions which he has refused to answer before the grand jury, and all questions of similar import which shall be propounded to him by any member of the grand jury or district attorney or any of his assistants in the presence of such jury, and until he shall pay such fine and costs," was illegal and void, as being in contravention of the fourth and fifth amendments of the Constitution of the United States.

IV.

The court erred in not holding that the act of Congress, to wit, an act of Congress of February 11, 1893, entitled "An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an
35 act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and amendments thereto," is unconstitutional, as being a violation of the fourth and fifth amendments of the Constitution of the United States.

WILLIAM SCOTT,
GEORGE B. GORDON,
Attorneys for Petitioner,
#450 *Fourth Avenue, Pittsburgh, Pa.*

36 UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *sct:*

To John W. Walker, United States marshal for the western district of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the United States circuit court, wherein Theodore F. Brown is appellant and you are appellee, to show cause, if any there be, why the judgment and decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness my hand this 5th day of October, A. D. 1895.

JOS. BUFFINGTON,
U. S. Judge.

Citation served upon John W. Walker, U. S. marshal, this 5th day of Oct., 1895.

H. D. GAMBLE, *Clerk.*

37 In the Circuit Court of the United States for the Western District of Pennsylvania.

THEODORE F. BROWN
vs.
JOHN W. WALKER. } No. 1. Nov. Term, 1895.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Seal of the U. S. Circuit Court, W. D. Penna.

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 5th day of October, A. D. 1895.

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Joseph Buffington, judge holding the United States circuit court for said district, do hereby certify that H. D. Gamble, above named, was at the time of making the above certificate and is now clerk of the said court, and that the said certificate made by him is in due form of law.

JOS. BUFFINGTON,
Sitting as U. S. Circuit Judge.

Pittsburgh, October 5th, 1895.

Endorsed on cover: Case No. 16,055. W. Pennsylvania C. C. U. S. Term No., 765. Theodore F. Brown, appellant, *vs.* John W. Walker, United States marshal for the western district of Pennsylvania. Filed October 7th, 1895.